(23,691)

# SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1914.**

## No. 173.

DETROIT TRUST COMPANY, TRUSTEE IN BANKRUPTCY OF THE ESTATE OF CHARLES COATES, BANKRUPT, APPELLANT,

*vs.*

THE PONTIAC SAVINGS BANK AND CHARLES COATES.

**APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.**

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United States Circuit Court of Appeals, Sixth Circuit.

TROIT TRUST COMPANY, Trustee of the Estate of CHARLES COATES, a Bankrupt, Complainant and Appellee,

vs.

NTIAC SAVINGS BANK (Impleaded with Charles Coates), Defendant and Appellant.

peal from the District Court of the United States for the Eastern District of Michigan.

RECORD.

Bernard B. Selling, Solicitor for Complainant and Appellee.
Elmer R. Webster, Solicitor for Defendant and Appellant.
Geer, Williams, Martin & Butler, of Counsel.

Filed Sep. 18, 1911. Frank O. Loveland, Clerk.

United States Circuit Court of Appeals, Sixth Circuit.

TROIT TRUST COMPANY, Trustee of the Estate of CHARLES COATES, a Bankrupt, Complainant and Appellee,

vs.

NTIAC SAVINGS BANK (Impleaded with Charles Coates), Defendant and Appellant.

peal from the District Court of the United States for the Eastern District of Michigan.

RECORD.

*Bill of Complaint.*

(Filed Sept. 14th, 1903.)

the District Court of the United States for the Eastern District of Michigan, in Bankruptcy.

the Hon. the District Court of the United States for the Eastern District of Michigan:

Your orator, the Detroit Trust Company, a corporation organized d doing business under the laws of the State of Michigan, and ated at Detroit, Michigan, as trustee of Charles Coates, Bankrupt, ngs this, its Bill of Complaint, against Charles Coates and the ntiac Savings Bank, a banking corporation organized under the s of the State of Michigan and located at Pontiac, in the County Oakland, State of Michigan, being authorized to come into this

court in accordance with the laws and statutes of the United States of America, and as grounds for complaint, your orator sets forth the following:

2 1. That upon the 6th day of March, A. D. 1903, upon an involuntary petition filed against the said Charles Coates by Buhl Sons & Company, a Michigan corporation; William J. Burton, doing business as W. J. Burton & Company, and the Co-Operative Foundry Company, a New York corporation, the said Charles Coates was duly adjudged a bankrupt in accordance with the Acts of Congress of the United States relating to bankruptcy, said petition for involuntary bankruptcy having been filed in this court upon the 16th day of February, A. D. 1903.

2. That upon the said 6th day of March, A. D. 1903, after said adjudication in bankruptcy, said proceedings were duly referred to Harlow P. Davock, referee in bankruptcy, and in the further course of said proceedings duly had, the complainant herein was chosen trustee of the estate and effects of said bankrupt, upon the 8th day of May, A. D. 1903, and thereafter your orator duly qualified as required by said acts and your orator avers that by reason of such appointment and qualification, your orator was vested by operation of law, with the title of the bankrupt as of the date he was adjudged a bankrupt, except insofar as pertains to property which is exempt, to all property transferred by said Charles Coates in fraud of his creditors and property, which prior to the filing of the petition in bankruptcy, the said Charles Coates could by any means have transferred or which might have been levied upon and sold under judicial process against him. And your orator was also vested with the right to avoid any transfer by the bankrupt of his property which any creditor of the said bankrupt might have avoided, and with the right to recover the property so transferred or its value, from the person to whom it was transferred, unless such transferee was a bona fide holder for value prior to the date of the adjudication, and your orator prays leave to refer to the records of said proceedings in bankruptcy, the same being No. 622 in this court on file with the clerk of the District Court of the United States for the Eastern District of Michigan, and with the Hon. Harlow P. Davock, referee of said court, and to make the same a part of this bill of complaint as if said records were duly and at large set out.

3. Your orator further represents that the said Charles Coates resides at Pontiac, in the County of Oakland, State of Michigan, and resided at said City of Pontiac during the entire year of 1902 and up to the present time; that the said Charles Coates was in the business of selling at retail, hardware and stoves in the City of Pontiac during the year 1902 and up to January 10th or 12th, 1903; that he was in said business as a sole trader and without partners.

3 4. Your orator further represents that it has been informed and believes and therefore so represents the fact to be, that the said Charles Coates, while engaged in said business at Pontiac, Michigan, in the year 1901 or 1902 borrowed a large sum of money, in the neighborhood of twenty-three (2300) hundred dollars, from the said, the Pontiac Savings Bank, a corporation as

aforesaid, without any other security, for said loan, than the note of the said Charles Coates.

5. Your orator further represents that upon the 19th day of May, A. D. 1902, the said Charles Coates, in order to secure to the said Pontiac Savings Bank, the payment of said sum of $2300, so loaned to the said Charles Coates by the Pontiac Savings Bank, executed and delivered to the said Pontiac Savings Bank, a chattel mortgage, a true copy of which is hereto attached and marked Exhibit A.

6. Your orator further represents that the said mortgage, although executed and delivered upon the 19th day of May, A. D. 1902, was not placed on record with the City Clerk of the City of Pontiac, Oakland County, Michigan, until the 9th day of September, A. D. 1902.

7. Your orator further represents that under the laws of the State of Michigan, the said mortgage from the said Charles Coates to the said Pontiac Savings Bank was constructively fraudulent, invalid and void as to all of the creditors of the said Charles Coates whose claims against the said Charles Coates were created and contracted between the said 19th day of May, A. D. 1902, and the said 9th day of September, A. D. 1902, the time in which the said chattel mortgage was kept from the files in office of the City Clerk of the City of Pontiac.

8. Your orator further represents on information and belief and so charges the fact to be that the debts on the part of the said Charles Coates to the following creditors to the amounts set opposite their respective names, were created and contracted between May 19th, A. D. 1902, and September 9th, A. D. 1902:

| | |
|---|---|
| Hibbard, Spencer, Bartlett & Co., Chicago, Ill | $12.00 |
| Estate of P. D. Beckwith, Dowagiac, Mich | 398.00 |
| Buhl Sons & Co., Detroit, Mich | 292.27 |
| Standard Oil Company, Chicago, Ill | 5.00 |
| American Stove Co., Cleveland, O | 35.60 |
| Co-Operative Foundry Co., Rochester, N. Y | 307.20 |
| Cleveland Co-Operative Stove Co., Cleveland, O | 543.29 |

9. Your orator further represents on information and belief and so charges the fact to be that there may be other debts on the
4 part of the said Charles Coates to creditors who have not filed their claims to an amount at present unknown to your orator, but your orator prays leave that when said claims have been filed and proved, the amount of the debts owing to such creditors created and contracted between May 19th, A. D. 1902, and September 9th, A. D. 1902, may be in this petition inserted and share in the benefits arising from the filing of this petition.

10. Your orator further represents that the said Charles Coates made payments to the said Pontiac Savings Bank from time to time after the filing of the said chattel mortgage until upon the 10th day of January, A. D. 1903, there was due to the said Pontiac Savings Bank, secured by the said chattel mortgage from the said Charles Coates, the sum of $2,120.50.

11. Your orator further represents that it has been informed and believes and therefore so charges the fact to be that upon the 10th day of January, A. D. 1903, the said Charles Coates made and completed an agreement with the firm of Tidball & Parmeter, to sell out to the said firm of Tidball & Parmeter, the furniture, fixtures, and stock of hardware and other goods of every kind and description in the possession of the said Charles Coates in his store at 42 North Saginaw street, Pontiac, Michigan, which said goods were described in and covered by the said chattel mortgage to the said Pontiac Savings Bank.

12. Your orator further charges that it has been informed and believes and therefore so charges the fact to be that the purchasers said Tidball & Parmeter, were informed of the existence of the said chattel mortgage so made by the said Charles Coates to the Pontiac Savings — and refused to carry out the purchase of said stock of goods until the said mortgage was discharged as a lien upon said stock of goods; that the price agreed upon for said stock of goods between the said Charles Coates and said Tidball & Parmeter was in the neighborhood of $5,187.36; that before the payment of said sum of money the said Charles Coates and the said Tidball and said Parmeter upon the evening of the 10th day of January, A. D. 1903 went to the banking office of the Pontiac Savings Bank, which was open and doing business; that it was then agreed between the said Charles Coates, the said Tidball, the said Parmeter and D. H. Power the president of the said Pontiac Savings Bank, that the said Tidball and Parmeter should pay, out of the purchase price of the said stock of goods, to the Pontiac Savings Bank, the amount of the said mortgage; that the mortgage was to be released and discharged and that the balance, after the payment of said mortgage upon said stock, was to be paid to the said Charles Coates.

13. Your orator further represents that it has been informed and believes and therefore so represents the fact to be that the arrangement in the preceding paragraph described was carried out according to said agreement on the evening of the 10th day of January A. D. 1903; that the Pontiac Saving Bank, through said D. H. Power, its president, executed and delivered to the said Tidball & Parmeter, a receipt reading as follows:

"PONTIAC, MICH., Jan'y 10/03.

Received of Charles Coates through Tidball & Parmeter, $2,120.50, in full settlement of the loan of this bank against the stock of hardware owned by C. A. Coates.

PONTIAC SAVINGS BANK,
D. H. POWER, *Prest.*"

14. Your orator further represents that it has been informed and believes and therefore so represents the fact to be that upon the following Monday, January 12th, 1903, Cramer Smith, cashier of the said Pontiac Savings Bank, went to the office of the city clerk of the said City of Pontiac and discharged the said chattel mortgage made by the said Charles Coates to the said Pontiac Savings Bank,

which said mortgage has heretofore been described and on the margin of the record of the said mortgage, wrote the following words: "I hereby acknowledge satisfaction and full payment, 1/12/03. Cramer Smith, Cashier."

15. Your orator further represents that the payment made by the said Charles Coates and said Tidball & Parmeter to the said Pontiac Savings Bank of said mortgage was made solely for the purpose of paying the said mortgage so that the said Charles Coates could give a good title to the said property in the mortgage described; and your orator charges that upon January 12th, A. D. 1903, the said Charles Coates did give to the said Tidball & Parmeter a bill of sale of the said stock of hardware, etc., free and clear of all liens and incumbrances and gave a warranty to that effect.

16. Your orator further represents that it has been informed and believes and therefore so represents the fact to be that when the amount of said mortgage was paid to the said Pontiac Savings Bank by the said Tidball & Parmeter on January 10th, A. D. 1903, the officers of the said Pontiac Savings Bank had knowledge that the said Charles Coates was insolvent and had reasonable cause
6 to believe that said payment of said mortgage indebtedness was intended to give to the said Pontiac Savings Bank a preference.

17. Your orator further represents that it has been informed and believes and therefore so represents the fact to be that the transaction between the said Coates, Tidball & Parmeter and the said Pontiac Savings Bank, was as to the said Charles Coates and the said Pontiac Savings Bank, a fraud upon the creditors of the said Charles Coates, who had become such between the date of the giving and the date of the filing of the said chattel mortgage.

18. Your orator further says that it brings this suit as trustee in behalf of all of the creditors whose claims arose either in whole or in part between May 19th, A. D. 1902, and September 9th, A. D. 1902, and also in behalf of all the general creditors of the said Charles Coates.

Forasmuch, therefore, as your orator is without remedy except in this court, your orator prays:

I. That the said defendants, the Pontiac Savings Bank and said Charles Coates, who are made parties defendant to this bill, may be required to full, true, direct and perfect answer make, but not under oath (answer under oath being hereby expressly waived) to all and singular the matters and things hereinbefore stated and charged as fully and particularly as if the same were here again repeated and they severally thereto distinctly interrogated, paragraph by paragraph.

II. That the said chattel mortgage made by the said Charles Coates to the said Pontiac Savings Bank may be held void and of no effect as against the creditors of the said Charles Coates who became such between the date of the giving and the date of the filing of the said chattel mortgage.

III. That the said Pontiac Savings Bank may be required to pay

to your orator in full, such part of the claims of the creditors of the said Charles Coates as were contracted between the date of the giving and the date of the filing of the said chattel mortgage.

IV. That the said Pontiac Savings Bank may be required to pay to your orator, the difference between the claims of creditors whose claims arose while said mortgage was withheld from the files and the sum received on January 10th, A. D. 1903, to wit: $2,120.50, for the benefit of the general creditors of the said Charles Coates.

V. That the said chattel mortgage may be decreed not only void as to those creditors whose claims accrued while said mort-
7 gage was withheld from the files but void as to all of the creditors of the said Charles Coates as a preference to the said Pontiac Savings Bank, repugnant to the statutes of the United States relating to bankruptcy.

VI. That your orator may have such other and further relief as may be consistent with equity and good conscience and to this court shall seem meet.

Your orator therefore prays that the process of a subpœna may be issued out of this court directed to the said Charles Coates and the said Pontiac Savings Bank, a Michigan banking corporation, requiring them at a certain time and under a certain penalty, to answer all and singular the matters and things in this bill charged and to stand and to abide and perform such order and decree herein as to this court shall be agreeable to equity and good conscience and your orator will ever pray.

(Sgd.) DETROIT TRUST COMPANY,
*Trustee of Charles Coates,*
(Sgd.) By RALPH STONE, *Secretary.*

BERNARD B. SELLING,
*Attorney for Complainant.*

STATE OF MICHIGAN,
*County of Wayne, ss:*

Ralph Stone, being duly sworn, deposes and says that he is the secretary of the Detroit Trust Company, a Michigan corporation, and that he has signed the foregoing bill of complaint in behalf of the Detroit Trust Company, a Michigan corporation, having been duly authorized so to do; that he has read said bill of complaint and knows the contents thereof; that the matters and things in the said bill contained are true of his own knowledge except as to those matters which are therein stated to be upon information and belief and as to those matters he believes it to be true.

(Sgd.) RALPH STONE.

Subscribed and sworn to before me this 14th day of September, A. D. 1903.

(Sgd.) CHAS. P. SPICER,
*Notary Public, Wayne County, Michigan.*

## Exhibit A.

(Copy.)

Know all men by these presents; That I, Chas. Coates, of the City of Pontiac, Michigan, of the first part, being justly indebted unto The Pontiac Savings Bank, a corporation of the City of Pontiac, Michigan, of the second part, in the sum of wenty-three hundred ($2,300) dollars, *has,* for the purpose of ecuring payment of said debt, and the interest thereof, granted, argained, sold and mortgaged, and by these presents does grant, argain, sell and mortgage unto the said Pontiac Savings Bank, the ollowing goods, chattels and personal property, to wit: All the urniture and fixtures and stock of hardware and other goods of very nature and description now on hand and in the possession of aid first party in his store at No. 42 North Saginaw street, and also ll the furniture, fixtures and stock of goods of every kind and description that shall hereafter be placed in said store of first party and lso all furniture and fixtures and goods that first party shall hereafter own and place in said store or any other location in said City f Pontiac, which said above described goods, chattels and property, t the date hereof, are situate at the store occupied by said Charles Coates on the east side of Saginaw St., in the City of Pontiac, Oakland County, Michigan, and are free and clear from all liens, conveyances, incumbrances and levies, and for a valuable consideration, I hereby warrant the above representations to be true.

To Have and To Hold the Same Forever, Provided, always, and he condition of these presents is such, that if the said Charles Coates hall pay or cause to be paid to the said party of the second part, a certain note given by said Charles Coates dated Jan. 18th, '00 on demand and amount of said note $2300.00 and interest from Jan. 1st, 1902, and to which this mortgage is collateral security, then this mortgage and said promissory note shall be void and of no effect. And I, the said Charles Coates, agree to pay the same accordingly. But if default shall be made in such payment, the said Pontiac Savings Bank is hereby authorized to and shall sell at public auction, after the like notice as is required by law for constables' sales, the goods, chattels and personal property hereinbefore mentioned, or so much thereof as may be necessary to satisfy the said debt, interest and reasonable expenses, and to retain the same out of the proceeds of such sale, the surplus or residue, if any, to belong and to be returned to said Charles Coates. And the said Pontiac Savings Bank is hereby authorized, at any time when it shall deem itself insecure, or if the said party of the first part shall sell, assign or dispose of the whole or any part of the said goods and chattels, or remove or attempt to remove the whole or any part thereof from the said store occupied by Charles Coates on the east side of Saginaw Street, without the written assent of the party of the second part, its representative, successors, or assigns, or his, her or their authorized agents, to enter upon the premises of the said

party of the first part or any place or places where the said goods and chattels, or any part thereof, may be, and take possession thereof, and the same retain in some convenient place, at the risk and expense of said Charles Coates until the said sum of money shall become due as aforesaid, and then to dispose of the same in the manner above specified.

In Witness Whereof, The said party of the first part has hereunto set his hand and seal the 19th day of May, A. D. 1903.

(S'g'd) CHAS. COATES. [SEAL.]

Signed, Sealed and Delivered in presence of
(S'g'd) CRAMER SMITH,
A. W. DICKSON.

*Answer of Defendant, Pontiac Savings Bank.*

(Filed Nov. 10th, 1903.)

In the District Court of the United States for the Eastern District of Michigan, Southern Division.

THE DETROIT TRUST CO., a Corporation, Complainant,
vs.
THE PONTIAC SAVINGS BANK, a Corporation, and CHAS. COATES, Defendants.

The Answer of the Pontiac Savings Bank, of Pontiac, Michigan, a Corporation Organized and Doing Business under the Laws of the State of Michigan, One of Said Defendants to the Bill of Complaint of Said Complainant.

This defendant reserving to itself all right of exceptions to the said bill of complaint, for answer thereto, says:—

10 1. That as to the matters alleged in paragraph one of said bill of complaint, this defendant has no knowledge and therefore neither admits nor denies the same, and leaves complainant to its proofs thereof.

2. That in answer to paragraph two of said bill of complaint, this defendant denies that complainant is, and denies that complainant ever has been, a judgment creditor of said Chas. Coates, and denies that complainant now has, and denies that complainant ever has had, any authority to test the validity of any transfer or mortgage made and legally entered for record more than four months preceding the filing of said involuntary petition for bankruptcy against said Chas. Coates; and as to the other allegations in said paragraph two of said bill of complaint this defendant neither admits nor denies the same, but leaves complainant to its proofs thereof.

(3) That this defendant neither admits nor denies the allegations in paragraph three of said bill of complaint but leaves complainant to its proofs thereof.

4. That this defendant denies the facts alleged in paragraph
ur of said bill of complaint.
5. That this defendant admits that said chattel mortgage de-
ribed in paragraph five of said bill of complaint was executed
ay 19th, 1902, but alleges that it was given as collateral security
a demand promissory note of said Chas. Coates to this defendant
ven January 18th, 1900, for money borrowed by said Chas.
ates from this defendant.
6. That this defendant admits the facts alleged in paragraph six
said bill of complaint.
7. That this defendant upon information and belief denies all
e facts and allegations in paragraphs seven, eight and nine of said
l of complaint.
8. That this defendant admits the facts alleged in paragraph ten
said bill of complaint.
9. That this defendant neither admits nor denies the allegations
paragraph eleven of said bill of complaint but leaves the com-
inant to its proofs thereof.
10. That this defendant admits that Tidball and Parmeter and
as. Coates went to this defendant's Bank January 10th, 1903,
d that Tidball and Parmeter then and there paid to this defend-
t $2120.50 in full satisfaction of said Chattel Mortgage, but de-
es that any such agreement between Tidwall and Parmeter, Chas.
Coates and the President of this defendant was made as al-
leged in paragraph twelve of said bill of complaint, and
neither admits nor denies the other allegations in said para-
aph twelve of said bill of complaint, but leaves complainant to
proofs thereof.
11. That this defendant admits the receipt set forth in paragraph
irteen of said bill of complaint, but on information and belief
nies the other allegations in said paragraph thirteen of said bill
complaint.
12. That this defendant admits the allegations in paragraph
irteen of said bill of complaint.
13. That this defendant neither admits nor denies the allegations
paragraph fifteen of said bill of complaint, but leaves complain-
t to its proofs thereof.
14. That this defendant denies the allegations in paragraphs six-
n and seventeen of said bill of complaint, and denies complain-
t's right and authority to institute this suit as alleged in para-
aph eighteen of said bill of complaint.
15. That this defendant further answering, says, that, on or about
nuary 18th, 1900, said Chas. Coates borrowed from this defend-
t $2,300.00 in money, and gave therefor to defendant his prom-
ory note, payable on demand for that amount. That to secure
d note, said Chas. Coates executed and delivered to this defendant
ay 19th, 1902, the said Chattel Mortgage described in said bill
complaint; that, through inadvertence and without intending to
nceal the existence of said Chattel Mortgage from any of said
as. Coates' creditors and without intending to defraud any of

his said creditors, this defendant neglected to file said Chattel Mortgage for record until September 9th, 1912.

16. That this defendant upon information and belief, alleges that all the creditors of said Chas. Coates had the means of knowledge of the existence of said Chattel Mortgage during the whole of the interval between the execution and filing thereof for record, that said Chattel Mortgage was legally on file continuously for a period of more than four months, from September 9th, 1902, to January 12th, 1903, when the same was discharged of record. That said Tidball and Parmeter voluntarily paid the balance of said Chattel Mortgage, to-wit: $2120.50, to this defendant, January 10th, 1903. That this defendant never had nor attempted to obtain possession of the property described in said Chattel Mortgage. That the involuntary petition to have said Chas. Coates adjudged a bankrupt was not filed in this Court until Feb. 16, 1903; more than five
12 months after said Chattel Mortgage had been legally filed.

That said Chas. Coates was not adjudged a bankrupt until March 6th, 1903, nearly six months after said Chattel Mortgage had been filed, and during the whole of this period not one of the alleged creditors of said Chas. Coates had ever made any attempt whatever to get possession or control of any of the property covered by said Chattel Mortgage, nor had even levied upon or attached any of said property, nor obtained Judgment, nor sued said Chas. Coates, nor taken any proceedings whatever to collect their said claims. That said alleged creditors of said Chas. Coates to said Tidball and Parmeter for several weeks before said sale was consummated, and also that over $3,000.00 of the purchase price of the property transferred at said sale was deposited for some time after said sale in this defendant's Bank by said Chas. Coates and did not make any attempt to collect any of their said claims either from said property or from the proceeds of the sale thereof.

17. That said alleged creditors of said Chas. Coates as this defendant has been informed and believes have not had their pretended claims against said Chas. Coates regularly allowed by this Court as the law prescribes. That said creditors are not judgment creditors of said Chas. Coates within the meaning of the law, and said creditors and said complainant have not placed themselves in a position to test, and have no authority and no right to test, the validity of the said Chattel Mortgage to this defendant nor of the said transfer from said Chas. Coates to said Tidball and Parmeter, nor to assert any claim to the said money paid to this defendant in satisfaction of said Chattel Mortgage.

18. That this defendant upon information and belief further alleges that many of the credits alleged by complainant to have been given to said Chas. Coates by his creditors in the interval between the giving and filing of said Chattel Mortgage to this defendant were not really given in said interval, and further that a large part thereof have since been paid by said Coates to said creditors. That this defendant did not know and had no reason to suspect that said Chas. Coates was insolvent when said Chattel Mortgage was given, nor when the same was filed, nor when the same was paid and dis-

charged. That all the transactions pertaining to said Chas. Coates' loan, note and Chattel Mortgage to this defendant were valid, bona fide and based on the consideration named therein, to wit:
13 & 14 $2,300.00, and that the same represented money borrowed, and there was no fraud whatever in any of the transactions pertaining thereto.

19. And this defendant further answering, denies that complainant is entitled to the relief or any part thereof in the said bill of complaint demanded, and prays the same advantage of this answer as if it had pleaded or demurred to said bill of complaint, and prays to be hence dismissed with its reasonable costs and charges in this behalf most wrongfully sustained.

[CORPORATE SEAL.]

THE PONTIAC SAVINGS BANK,
*Of Pontiac, Mich., a Corporation,*
By FRANK H. HALE, *Vice-President.*

ELMER R. WEBSTER,
*Business Address: Pontiac, Mich.,*
*Attorney for Defendant.*
THE PONTIAC SAVINGS BANK.
HARRISON GEER,
*Of Counsel.*

*Answer of Defendant Coates.*

(Filed Nov. 10th, 1903.)

* * * * * * *

15–21 On November 10th, 1903, the complainant duly filed replication to the answers of the Pontiac Savings Bank and Charles Coates.

* * * * * * *

22 CHARLES F. MERTZ, being duly sworn, testified:

Examined by Mr. BERNHARD:

I reside in Rochester, N. Y., and am cashier for the Co-Operative Foundry Co. I have been its cashier for nearly twenty-one years. I have charge of its books. There was a time when I received an order from Charles Coates for some stoves. That order was received February 8th, 1902. That order consisted of the following:

| | | |
|---|---|---|
| Two #9/20 Mascot & Reservoir, coal and wood..... | $16.75 | each |
| Two #8/18 Mascot square ..... | 11.00 | " |
| Two #8/18 Mascot square reservoir..... | 13.65 | " |
| One #9/18 Princess and reservoir and high closet... | 31.00 | " |
| One #9/16 Princess and reservoir and high closet... | 34.00 | " |
| Four #84 Royals..... | 33.25 | " |
| One #85 Royals ..... | 37.05 | " |
| Two #83 Royals ..... | 29.45 | " |
| Two #47 Sunbeams ..... | 21.85 | " |
| Two #48 Sunbeams ..... | 24.70 | " |

These items were shipped to the best of my knowledge. We received the shipping bills in our office. These deliveries were checked off on our books as we delivered. Exhibits A and B are the original shipping bills which I received. The shipping bill, Exhibit A, represents shipment of August 2nd, 1902, and Exhibit B represents the shipment of September 8th, 1902. Exhibit A represents the shipment of August 1st on the order taken February 6th of four No. 84 Royals, one 85, two 83 Royals, two 47 Sunbeams and two 48 Sunbeams. Before the shipment of Augusut 1st was made, there had been a change made in the design of the stove which necessitated a new number; the 84 was renumbered 94, the 85 renumbered 95, and the 83 renumbered 93. The bill for ten of
23 these parlor stoves was rendered August 10th, 1902; the bill for one parlor stove, or the balance of the order, was rendered September 9th, 1902. This stove was, according to shipping bill, shipped September 8. No part of this whole order has been paid for.

Examined by Mr. WEBSTER:

The bill dated March 17th, 1902, from the Co-Operative Foundry Co. to Charles Coates for $144.60, marked Exhibit 1 for identification.

The bill dated August 4th, 1902, from the Co-Operative Foundry Co. to Charles Coates for $271.75, marked Exhibit 2 for identification.

The bill dated September 9th, 1902, from the Co-Operative Foundry Co. to Charles Coates for $35.45 marked Exhibit 3 for identification.

The bill dated November 1st, 1902, from the Co-Operative Foundry Co. to Charles Coates for $3.16 marked Exhibit 4 for identification.

The bill dated December 5th, 1902, from the Co-Operative Foundry Co. to Charles Coates for $2.01 marked Exhibit 5 for identification.

Duplicate order signed Charles Coates to the Co-Operative Foundry Co., Rochester, N. Y., dated Feb. 6th, 1902, marked Exhibit 6 for identification.

Exhibits 1 to 6 were produced by Mr. Webster and presented to the witness for identification.

Exhibit 6 is the order I have testified to having received February 8th, 1902. The printed matter on this order was on the order received by me. On the order blank is the following: "This order is not subject to countermand." There was also on that order blank the following: "It is expressly agreed that if the purchaser shall transfer the whole or any part of his stock in trade, except in the ordinary course of business, or that if the same shall be in any wise encumbered, whether by his voluntary act or any suit or proceeding brought against him, the account for the merchandise ordered herewith shall forthwith mature and become due and payable notwithstanding the terms of credit may not otherwise have expired." I suppose this order was signed by Charles Coates, as

the duplicate copy showed his signature. Our traveling agent through whom we obtained this order was Henry Garretsee. We had a report on Charles Coates from Dunn's. Exhibit 5, the bill from the Co-Operative Foundry Co. to Charles Coates, dated December 5th, 1902, for $2.01, was ordered a few days prior to that date; I could not just say the date. Exhibit 4, the bill from the Co-Operative Foundry Co. to Charles Coates dated Novem-
24 ber 1st, 1902, for $3.16, was probably ordered a few days prior to November 1st, 1902. All the other orders that I have mentioned were ordered February 6th. They were ordered by Mr. Coates and the order was received on February 8th. The change in the number of the stoves was instituted by changing the number on the order after the order was received, but they were the same comparative size of stove.

The total amount of indebtedness now on the part of Coates to the Co-Operative Foundry Company is $456.97, exclusive of interest.

EDWARD S. BRAYER, being duly sworn, testified:

Examined by Mr. BERNHARD:

I reside in Rochester, N. Y., and am employed as assistant shipping clerk by the Co-Operative Foundry Co., of Rochester, N. Y. I remember shipping the articles specified in Exhibits A and B; August 2nd, 1902, ten parlors, and September 8th, 1902, one parlor, which makes a total of eleven stoves. I shipped from Lincoln Park on August 2nd, four 94 Royals, two 93 Royals, two 47 Sunbeams, and two 48 Sunbeams. The item specified on Exhibit B is a 95 Royal, which was shipped September 8th. As they were shipped I checked them off. I sent the bills on which I checked them off first to the head shipping clerk of the Co-Operative Foundry Co. and the shipping clerk entered them on his book and sent them into the office. They were loaded on the cars at that time.

DENNIS F. MCCARTHY, being duly sworn, testified:

Examined by Mr. BERNHARD:

I reside in Rochester, N. Y., and am invoice clerk for the Co-Operative Foundry Co. Part of my duties is to make out the bills, I am supposed to make them out. I made out the bills for the last five items on Exhibit 6. Those bills were made out pursuant to the report made to me by the shipping clerk, the witness sworn before me. The bills were made out in conformity with that report.

Examined by Mr. WEBSTER:

Exhibits 2 and 3 are exact copies of our books, as to dates, all details. The bill, Exhibit 3, was dated September 9, 1902. That is the way it is marked. Exhibit 4 is dated November 1st, 1902.

25 EXHIBIT 6.

Ord'd per Garretsee. Date, Feb. 6, 1902.

Co-Operative Foundry Co., Rochester, N. Y.

Send to Chas. Coates.
Town, Pontiac, Mich.
Via B., R. & P., and allow F. O. B. On or about now.
Terms: April 1/02, 2 mos. 5% Cash May 1.

This order is not subject to countermand. It is expressly agreed, that if the purchaser shall transfer the whole or any part of his stock in trade, except in the ordinary course of business, or that if the same shall be in any wise encumbered, whether by his voluntary act or any suit or proceeding brought against him, the account for the merchandise ordered herewith shall forthwith mature and become due and payable, notwithstanding the terms of credit may not otherwise have expired.

Prices and Terms Guaranteed to Nov. 1/02.

| | | | |
|---|---|---|---|
| 2 | 9/20 | Mascot & Res. C. & W. | $16.75 |
| 2 | 8/18 | " (—) C. & W. 11.00 | 11.00 |
| 2 | 8/18 | " & Res. " | 13.65 |
| 1 | 9/18 | Princess Res. & H. Closet Dx Iron | 31.00 |
| 1 | 9/16 | " " " " " | 34.00 |

Any of the above on hand unsold May 1/02 and so reported at that date to be carried to —.

Also Aug. 1 bill dated Oct. 1/02 2 mos.

| | | | |
|---|---|---|---|
| 4 | 84 | Royals & H. | 50 & 5 |
| 1 | 85 | " " " | |
| 2 | 83 | " " " | |
| 2 | 47 | Sunbeams | |
| 2 | 48 | " | |

CHAS. COATES.

## EXHIBIT 2.

*(Statement of Co-operative Foundry Co. Against Charles Coates. Unnecessary Parts of Heading Omitted.)*

ROCHESTER, N. Y., Aug. 4, 1902.

Sold to Chas. Coates.
Shipped via B., R. & P.
Terms: Oct. 1—2 Mos.
Pontiac, Mich.
Order Feb. 6th.

(Written obliquely across face: "Part of Order. Balance will follow soon.")

| | | | | |
|---|---|---|---|---|
| | 4 | 94 Royal | $33.25 | $133.00 |
| | 2 | 93 " | 29.45 | 58.90 |
| 26 | 2 | 47 S. Beam | 21.85 | 43.70 |
| | 2 | 48 " | 24 70 | 49.70 |
| | | | | $285.00 |
| 1 box Memo. Files, Less Freight | | | | 13.25 |
| | | | | $271.75 |

## EXHIBIT 3.

*(Statement of Co-Operative Foundry Co. Against Charles Coates. Unnecessary Parts of Heading Omitted.)*

ROCHESTER, N. Y., Sept. 9, 1902.

Sold to Chas. Coates.
Shipped via B., R. & P. Pontiac, Mich.
Terms: Oct. 1—2 Mos.

Ordered Before Aug. 21st, 1902.

| | |
|---|---|
| 1 65 Royal | $37.05 |
| Less Freight | 1.60 |
| | $35.45 |

On March 24th, 1904, the deposition of William W. Decker was taken at Cleveland, Ohio, on behalf of the complainant, before Oscar J. Horn, a notary public, pursuant to due notice. Fred E. Bruml appeared as solicitor for complainant, and Elmer R. Webster appeared as solicitor for defendant, The Pontiac Savings Bank. The deposition was signed by the witness and was duly certified and returned by the notary in proper form.

WILLIAM W. DECKER, being duly sworn, testified:

Examined by Mr. BRUML:

I live in Cleveland, Ohio, and am credit man for the Cleveland Co-Operative Stove Co. They have offices in the city of Cleveland. I have met Charles Coates, of Pontiac, and know him personally. I met him in Pontiac. The Cleveland Co-Operative Stove Co. transacted business with him, sold him goods. It sold him the list of goods, Exhibit A. It sold him the goods shown in this list marked Exhibit A.

Exhibit A offered in evidence.

Exhibit B is an order from Charles Coates to the Cleveland Co-Operative Stove Co. for one 16 Royal Ruby.

Exhibit B offered in evidence. It is dated December 23rd, 1901.

27 Exhibit C is an order from Charles Coates to the Co-operative Stove Co.

Exhibit C offered in evidence. It is dated March 8th, 1902.

Exhibit D is an order from Charles Coates to the Co-Operative Stove Co.

Exhibit D offered in evidence. It is dated November 5th, 1902.

Besides these orders there was one mail order of goods sold to Mr. Coates. That order was shipped September 26th, 1902. There was nothing else shipped to Mr. Coates on his order. There was no payment made by Mr. Coates on this account. All these goods were sold to Mr. Coates upon his order, and they were shipped to him, and received by him.

When we receive an order, the order is first given to the entry clerk, and he enters it, and then it goes to me and stays in my possession until ready for shipment, at which time I pass upon the credit, whether it is to go or not. The contract for the sale of these goods is called closed in our concern when we make the shipment, on the date we make the shipment: that is the time we charge the goods. That is the method that we pursued with Mr. Coates. That is the method we pursue with all our business. Credit was actually extended with reference to these shipments from the date of the invoices. The date of the invoices is the date of the shipments. The total amount of goods which we shipped to Mr. Coates was $605.64. There was an allowance for freight shipments of August 8th and 13th, amounting to $15.99 made upon these shipments. That allowance was part of the term, we allowed him the freight he paid.

Exhibit E is the original bill of lading of the shipments of December 27th, 1901. It was shipped via the L. S. & M. S. Ry. to Charles Coates, Pontiac, Mich. Exhibit F is the original bill of lading of our shipment of August 7th, 1902, via the L. S. & M. S. Ry. Exhibit G is the original bill of lading of our shipment of August 13th, 1902, via the L. S. & M. S. Ry. to Charles Coates,

Pontiac, Mich. Exhibit H is the original bill of lading on our shipment of November 10th, 1902, via the L. S. & M. S. Ry. to Charles Coates, Pontiac, Mich. Exhibit I is the expense bill from the G. T. Ry. showing the receipt of stoves, the amount of freight paid on the same for our shipment of August 8th, 1902, via the L. S. & M. S. Ry., for which Mr. Coates was given credit. Exhibit J is the expense bill from the G. T. Ry., showing the amount of freight on the goods received on our shipment of August 13th, 1902.

Exhibits E to J were offered in evidence.

28 Cross-examination.

Examined by Mr. WEBSTER:

I could not tell the exact date we received the order of Mr. Coates, Exhibit C, dated March 8th, 1902, in our office in Cleveland; it would probably be within two or three days from that date. I can find out (witness telephoned his office), it was March 10th, 1902. The order, Exhibit D, was received at our office November 7th, 1902. The order Exhibit B was received at our office December 26th, 1901. Exhibit C was signed by Charles Coates. This order stated on it that no countermands would be accepted. It also stated that the Co-Operative Stove Co. received the privilege of rejecting or accepting it or any part of it upon receipt of it at their office. I believe that I examined Bradstreet's report as to Mr. Coates. These accounts that I have testified to are open accounts. We do not have any promissory notes. We never sued Mr. Coates to collect it.

The order marked Exhibit C, dated March 8th, 1902, covers the goods which were shipped August 8th, 1902, and August 13th, 1902. Exhibit C was the only order we received for those goods.

Redirect examination.

By Mr. BRUML:

Credit would not be extended with reference to the order marked Exhibit C, or any attention paid to it, until August 1st. It was shipped August 1st; we attend to the credit a few days before shipping; we pay no attention to those orders until the time for shipment. We get orders in now to ship next November. All shipments of that kind are always held until the date of shipment to pass on credit. We often times take orders of that kind, a great many orders of that kind, and people fail or go out of business before it comes time to pass on the order. With reference to this order, we considered acceptance made between the first of August and the date of shipment, probably two or three days before shipment. In that case it shows that it was two days before, for the reason that part of the goods were delivered to the depot on the 7th and part on the 8th, as the bill of lading shows that the entire shipment was not received at the depot until the afternoon of the 8th.

I went up to Pontiac and asked for the money that Coates owed. I asked him to pay.

Recross-examination.

By Mr. WEBSTER:

I made that demand when I was in Pontiac. I cannot tell
29 just the exact date. I started for Pontiac on Sunday, February 1st. It was on Monday, February 2nd, that I dropped into your office when you were kindling your fire there February 2nd, 1903. The Cleveland Co-Operative Stove Co. never has taken any legal steps to collect from the Pontiac Savings Bank. The Cleveland Co-Operative Stove Co. sent Mr. Coates a statement before I went to Pontiac that time in February, and notified him of draft. The traveling agent who took those orders of Mr. Coates was A. P. Chilson, who resides at Bryan, Ohio. He travels in Michigan for us.

EXHIBIT A.

(*Cleveland Co-Operative Stove Co. Statement, Dated March 19th, 1904, of Account with Charles Coates. Unnecessary Clauses in Heading of Statement Omitted.*)

| 1901. | Quan. | No. | Description. | Price. | Total. |
|---|---|---|---|---|---|
| Dec. 27. | 1 | 16 | Royal Ruby..... | $62.60 | |
| | | | Less 50% | 31.30 | |
| | | | | 31.30 | $31.30 |
| 1902. | | | | | |
| Aug. 8. | 3 | 14 | Royal Rubies, at $53.70 ..... | $161.10 | |
| | 5 | 15 | Royal Rubies, at $57.85. ..... | 289.25 | |
| | 5 | 16 | Royal Rubies, at $62.60 ..... | 313.00 | |
| | 2 | 12 | Royal Opal, at $42.25 ..... | 84.50 | |
| | 2 | 14 | Royal Opal, at $50.50 ..... | 101.00 | |
| | | | | 948.85 | |
| | | | Less 50% | 474.42 | |
| | | | | 474.43 | 474.43 |
| | 2 | 10 | Cycle T. & B. Mtd. Com. $7.75... | 15.50 | |
| | | | Less 50% | 7.75 | |
| | | | | 7.75 | |
| | | | Less 5% | .38 | |
| | | | | 7.37 | 7.37 |

| | | | | | |
|---|---|---|---|---|---|
| | 1 | 8/18 Royal Grand Ex. & H. C. P. F. & Cast Reservoir. | 55.66 | | |
| | | Less 45% | 25.04 | | |
| | | | 30.62 | | |
| | | Less 5% | 1.53 | | |
| | | | 29.09 | 29.09 | |
| | | | | 510.89 | 510.89 |
| 30 | 1 | 16 Royal Ruby inside mica frame for upper front mica door D. H. | | | |
| 1902. | | | | | |
| Aug. 13. | 1 | 9/20 New Grand Ex. & H. C. P. F.... | 62.00 | | |
| | | Less 45% | 27.90 | | |
| | | | 34.10 | | |
| | | Less 5% | 1.70 | | |
| | | | 32.40 | 32.40 | 32.40 |
| Sept. 26. | 1 | 9 Gazelle Back-wall 6# at 6c.. | | .36 | .36 |
| Nov. 10. | 2 | 11 Junior Oaks, at $4.00 ..... | $8.00 | | |
| | 2 | 13 Junior Oaks, at $5.00 ..... | 10.00 | | |
| | 2 | 15 Junior Oaks, at $6.00 ..... | 12.00 | | |
| | | | 30.00 | 30.00 | |
| | | For 9/20 New Grand | | | |
| | 1 | Nickel clean-out flue door ..... | .15 | | |
| | 1 | Hard coal end lining at feed door, 9# at 6c | .54 | | |
| | | | .69 | .69 | |
| | | | | 30.69 | 30.69 |
| | | | | | $605.64 |

Cr.

| | | |
|---|---|---|
| Freight on shipment of Aug. 8..... | $15.07 | |
| Freight on shipment of Aug. 13..... | .92 | |
| | $15.99 | 15.99 |
| | | $589.65 |

## Exhibit B.

It is understood that all claims for shortage or allowance must be made within ten days after the receipt of goods. Also that there is no agreement other than is specified herein that shall be binding on the Cleveland Co-Operative Stove Co., and they reserve the privilege of rejecting or accepting this order.

31 No Countermands Accepted. All Shipments made at Owner's Risk.

Cleveland Co-Operative Stove Co.

Order No. 378. 12/23, 1901.
Send to Chas. Coates.
Of Pontiac, Mich.
How Ship: Best route.
Terms: See Below.

Interest Charged after Maturity.

| | | | |
|---|---|---|---|
| 1 | #16 | Royal Ruby | $62.60 |
| | | Less 50% | 31.30 |

Fgt. allowed.
Black & Polish.
Ship at once
and make next
fall dating.
See Letter.

CHAS. COATES, *V. D.*

## Exhibit C.

(Same Heading as Exhibit B.)

Order No. 114. 3/8, 1902.
Send to Chas. Coates.
Of Pontiac, Mich.
How ship: Best Route.
Terms: Nov. 1st 60-5% 30.

Interest Charged After Maturity.

| | | | | |
|---|---|---|---|---|
| 3 | #14 | R. Ruby | $53.70 | $161.10 |
| 5 | #15 | " " | 57.85 | 289.25 |
| 5 | #16 | " " | 62.00 | 313.00 |
| 2 | #12 | " Opal | 42.25 | 84.50 |
| 2 | #14 | " " | 50.50 | 101.00 |

Less 50%.

| | | | | |
|---|---|---|---|---|
| 2 | #10 | Cycle Com. | 7.75 | 15.50 |

Less 50-5%.
4-9 in. Lids.

| | | | |
|---|---|---|---|
| 1 | #8/18 | Royal Grand Ex | 55.66 |

H. C. Cast Res. Pouch feed.

1 #9/20 New Grand Ex.

H. C. Pouch feed..... 62.00

Less 45-5%..... 117.66
Ship Aug. 1st..... 52.95

Fgt. allowed..... 64.71
3.23

Black & Polish..... 61.48

Chilson.
(Signed) CHARLES COATES.

EXHIBIT D.

(Same Heading as Exhibit B.)

Order No. 373. 11/5, 1902.
Send to Chas. Coates
Of Pontiac, Mich.
How ship: Best Route.
Terms: 60 days 5-30.

Interest Charged After Maturity.

#11 Jr. Oaks Net..... 4.00
#13 " " ..... 5.00
#15 " " ..... 6.00

Fgt. allowed.
Black & Polish.
Nickel Clean out flue door
End Lining to fire box for coal for feed door end of fire Box for #9/20 New Grand.

On May 12th, 1904, the deposition of O. G. Beach was taken at Dowagiac, Mich., on behalf of the complainant, before J. O. Becraft, notary public, pursuant to due notice. Coy W. Hendryx appeared as solicitor for the complainant and Elmer R. Webster appeared as solicitor for the defendant, the Pontiac Savings Bank. The deposition was signed by the witness and was duly certified and returned by the notary in proper form.

O. G. BEACH, being duly sworn, testified:

Examined by Mr. HENDRYX:

I reside in Dowagiac, Mich., and am sales manager for the estate of P. D. Beckwith. As sales manager I have access to the orders, shipping bills, correspondence and other papers of the Estate of P. D. Beckwith. I am acquainted with Charles

Coates, of Pontiac, Mich., by reputation. He was formerly a customer of the P. D. Beckwith Estate. Exhibit A is an order from Charles Coates dated February 1st, 1902, for Round Oak repairs. These goods were shipped.

Exhibit A offered in evidence.

Exhibit B is the bill of lading, dated February 3rd, 1902, for these goods. An invoice of the goods for this shipment was sent to Mr. Coates. Exhibit C is the invoice, dated February 5th, 1902, for the repairs in question, amounting to $5.17. Exhibit D, dated March 1st, 1902, is an order for Round Oak goods from Mr. Coates, solicited by our salesman, W. T. Leckie. Those goods were shipped. There were separate shipments made. The steel range was shipped first. Exhibit E, dated March 4th, 1902, is the bill of lading for the range. Exhibit F, dated March 6th, 1902, is the invoice for the range in question, amounting to $42.09. The balance of the goods ordered by Mr. Coates as evidenced by Exhibit D were shipped August 8th, 1902. Exhibit G, dated August 8th, 1902, is the bill of lading for the balance of the goods shipped. Exhibit H, dated August 13th, 1902, is the invoice for the goods shipped to Mr. Coates on August 8th, 1902. Exhibit I is an order for furnace repairs from Mr. Coates. Those goods were shipped. Exhibit J, dated September 26th, 1902, is the bill of lading for the furnace repairs. An invoice was sent Mr. Coates. Exhibit K, dated September 29th, 1902, is the invoice for the furnace repairs, amounting to $8.63. Exhibit L, dated October 10th, 1902, is an order from Mr. Coates for Round Oak repairs. Those goods were shipped to him. Exhibit M, dated October 11th, 1902, is the bill of lading for the stove repairs just mentioned. An invoice representing $8.65 was sent to Mr. Coates for that shipment. Exhibit N, dated October 15th, 1902, is the invoice for the repairs in question. Exhibit O, dated December 11th, 1902, is an order for stove repairs from Mr. Coates. Those goods were shipped on that order. They were shipped in two different shipments. We had to get advice from Mr. Coates, and shipment of a part was deferred. Part of those goods were shipped at once. Exhibit P, dated December 12th, 1902, is the bill of lading for the first shipment. An invoice of the first shipment on that order was sent to Mr. Coates. Exhibit Q, dated December 15th, 1902, is the invoice for the first shipment, amounting to $2.30. We afterwards received letters from Mr. Coates explaining the order Exhibit O. The letters, Exhibits R, dated December 13th, 1902, and R1, dated December 9th,
34 1902, are the descriptions asked for regarding the parts and also the additional repair which he ordered.

These goods were shipped Mr. Coates. Exhibit S, dated December 16th, 1902, is the bill of lading for those goods. An invoice for those goods was sent Mr. Coates. Exhibit T, dated December 18th, 1902, is the invoice for the repairs in question, amounting to $6.54.

It has been my duty in connection with the Beckwith Estate, to pass upon the credit of customers. I passed upon the credit of Mr. Coates. The steel range mentioned in Exhibit D, the order

Mr. Coates for goods dated March 1st, 1902, was shipped immediately upon receipt of the order, but the balance was not shipped til our regular shipping season, some time in August. The ount of the balance shipped in August was $398.00. Before the ds amounting to the $398.00 were shipped his credit was passed n. I was the credit man of the Beckwith Estate at that time. credit was extended or given to Mr. Coates on this shipment of gust 8th, 1902, for $398.00 either on the day of the shipment a few days before. Credit was not extended to him for this ount of $398.00 when the order was received. Credit was not nded to him on this bill of goods of $398.00 before May 19th, 2. No credit was extended to him on this bill of goods after tember 9th, 1902.

The total amount of goods shipped Mr. Coates which remains aid for is $471.38. No part of that, and no part of the $398.00 been paid. I did not know anything about a chattel mortgage ing been given by Coates to the Pontiac Savings Bank until e time after September 9th, 1902. I can not state exactly now n I first learned of it, but it was shortly after it was placed on that we received notice of it through the collection agencies. I no knowledge of the execution or existence of a chattel mortge by Coates through the bank prior to September 9th, 1902.

Cross-examination.

By Mr. WEBSTER:

was appointed credit man for the Beckwith Estate in 1889. I its credit man March 1st, 1902, and from March 1st, 1902, to rch 6th, 1902. The Beckwith Estate received the order, Exit D, between March 2nd, and March 4th. This order was sent the house by mail. Exhibit U, dated March 2nd, 1902, is the er which accompanied and contained this order. Our salesman, T. Leckie, was not present March 4th, 1902, when I sent the l ranges to Coates. The order, Exhibit D, was accepted by letter rch 4th, but we do not keep copies of letters acknowledging receipt of orders.

Prior to the receipt of this order, Mr. Coates had a rating and the steel range which was ordered for immediate shipnt, being a small order, was shipped on his old rating. When main body of the order was shipped I as credit man looked him and credit was extended to him at that time, as stated above in deposition. My house trusted Mr. Coates for other goods before y 19th, 1902, and also for other goods after September 9th, 1902. house has never instituted any suit against Charles Coates to over any part of the debt against him. I have nothing to do h filling orders or making shipments from my house except pass; on the credits.

## EXHIBIT D.

Estate of P. D. Beckwith, Dowagiac, Mich.
Manufacturers of the
Genuine Round Oak Stoves, Ranges, and Furnaces.

Date March 1st, 1902.

Order No. 91.
Ship to Chas. Coates.
Town, Pontiac. State, Mich.
Route—P., O. & N.
Freight Allowance—10c. per 100 lbs.
Terms—Oct. 1st, 25% 2nd 5%, 30 days 2% 60 days.

| No. | Articles. | Size. | Coal or Wood. |
|---|---|---|---|
| 1 | Rd. Oak | 24 | Wood. |
| 2 | Rd. Oaks | 14 | Coal. |
| 3 | " " | 16 | " |
| 10 | " " | 18 | " |
| 5 | " " | 20 | " |
| 1 | " " | 22 | " |
| 2 | Mag | 14 | |
| 3 | " | 16 | |
| 10 | " | 18 | |
| 5 | " | 20 | |
| 1 | " | 22 | |
| 6 | Wood Grates | 18 | |
| 1 | " " | 20 | |
| 1 | " " | 22 | |
| 1 | Doz. Shovels | | |
| 1 | Hot Blast | 18 | Coal. |
| 1 | Steel Range | 9-18 | |
| | Res. & H. C. | | |
| | Sample of Steel. | | |

Shipped Mar. 4, 1902.
O. G. BEACH,
Ship at once.

Answered Mar. 4, 1902.
BECRAFT.

Ship Aug. 30th.
On Hand, 2 Kat, 16 x 18.

36 EXHIBIT H.

*(Statement of Account of Estate of P. D. Beckwith against Charles Coates. Unnecessary Statements in Heading Omitted.)*

DOWAGIAC, MICH., Aug. 13, 1902.

Sold to Charles Coates, Pontiac, Mich.

Terms: Oct. 1. 2 Months.
5 Per Cent. off 30 days, 2 Per Cent. off 60 Days.

| | | | | | |
|---|---|---|---|---|---|
| 1 | Round Oak | #24 | Wood | | 27.00 |
| 2 | " " | 14 | Coal | | 32.00 |
| 3 | " " | 16 | " | | 54.00 |
| 10 | " " | 18 | " | | 200.00 |
| 5 | " " | 20 | " | | 120.00 |
| 1 | " " | 22 | " | | 27.00 |
| 1 | Hot Blast | 18 | | | 18.00 |
| 2 | Magazines | 14 | | | 4.00 |
| 3 | " | 16 | | | 6.00 |
| 10 | " | 18 | | | 20.00 |
| 5 | " | 20 | | | 15.00 |
| 1 | " | 22 | | | 3.00 |
| 6 | Wood Grates | 18 | | | 7.50 |
| 1 | " " | 20 | | | 1.50 |
| 1 | " " | 22 | | | 2.00 |
| 12 | Shovels | | | | 3.00 |
| | | | | | 540.00 |
| | 25% | | | | 135.00 |
| | | | | | 405.00 |
| | Freight Allowance | | | | 7.00 |
| | | | | | $398.00 |

On May 19th, 1904, the depositions of Albert B. Raiguel, William H. Walton and C. Elwood Hanna were taken at Philadelphia, on behalf of the complainant, before Joseph W. Mills, a Notary Public, pursuant to due notice. H. M. McCaughey appeared as solicitor for the complainant and no one appeared for the defendants. The depositions were duly signed by the witnesses and were duly certified and returned by the notary in proper form.

ALBERT B. RAIGUEL, being duly sworn, testified:

Examined by Mr. MCCAUGHEY:

37 My occupation is that of bookkeeper for Merchant & Co. I have been bookkeeper for Merchant & Co. about twelve years. As bookkeeper I have charge of all the accounts. The bill clerk makes all entries of charges on the books of original entry

under my supervision. I know the name of Charles Coates, of Pontiac, Mich., as an account upon our books. Merchant & Co. had business dealings with Coates. He bought several bills of goods of us, including solder, nails and tin plate. Merchant & Co. had an account with Coates, we had an account on our ledger. I have the books of original entry with me (witness produces books). Charles Coates is indebted to Merchant & Co. for goods sold on September 4th, 1902, amounting to $141.58, and another bill on December 3rd, 1902, amounting to $124.38, making a total indebtedness of $265.96. We have credit on this account, a note received in settlement of the bill of September 4th, amounting to $141.58, which note was due December 30th, 1902, and has never been paid. The balance due us at present is therefore $265.96, the same as if the note had never been given.

The first goods were charged against Coates' account on September 4th, 1902. There had been some previous transactions with him which were satisfactorily settled. The two invoices representing this particular indebtedness of $265.96 were sold and delivered to him so far as the books show on September 4th, and December 3rd, 1902.

Exhibit A, being an itemized account of Charles Coates, showing balance due by him to Merchant & Co. marked Exhibit A and offered in evidence.

The amount of $265.96 is now justly due and payable to Merchant & Co. They received no payment on account thereof.

Q. State whether or not you had any knowledge of a mortgage executed by Coates to the Pontiac Bank prior to September 9th, 1902.

A. No.

WILLIAM H. WALTON, being duly sworn, testified:

Examined by Mr. MCCAUGHEY:

I reside in Philadelphia, and am traffic manager for Merchant & Co., Inc., of Philadelphia. I have been employed by Merchant & Co. in that capacity twenty-nine years. As traffic manager my duties are to have all the orders pass through my hands for shipping, to give routing for the same and instructions to the shipping department to forward the goods, overlooking the price of goods, in fact, taking charge of all details connected with the entire shipment of goods. I look over the bills of lading that are forwarded at the time the bills are sent out, in short, I see that the goods are actually delivered and shipped in accordance with the shipping instructions. We made several shipments to Charles Coates, Pontiac, Mich. I have in my hands an original order from Charles Coates, Pontiac, Mich., on his printed letterhead signed Charles Coates, wherein he requests, under date of August 29th, to ship at once ten boxes of old style C. 20 x 38 I. C. Roofing Tin, also one hundred pounds of solder and wire, half and half, 25 pounds of barb wire nails ¾-inch. This order was duly entered on our shipping department's books and executed in the regular way, shipped on

38

September 4th, 1902, and bill of lading regularly mailed after the goods were forwarded to the consignee. I also have in my hands an order from Charles Coates, Pontiac, Mich., dated November 19th, 1902, on his regular letterhead and signed Charles Coates to ship with the utmost dispatch 10 boxes of old style C. Roofing Tin 20 x 38 I. C., 25 pounds of 7/8-inch nails. This order was duly executed in the regular way, shipment was forwarded and invoice dated December 3rd, 1902; the bill and bill of lading followed in the usual way, immediately after shipment, and we have never received any complaint about the goods not having reached the consignee. These goods were sold on the usual terms, sixty days, and were marked on the orders by the financial department. The first invoice dated September 1st would show without the slightest doubt that credit was extended to Coates between May 19th and September 9th, 1902. I did not know at the time I shipped the goods mentioned in the order that the Pontiac Savings Bank held a mortgage executed by Coates prior to September 9th, 1902, and I have no knowledge of that fact at this time.

The two original orders, marked Exhibit B, offered in evidence.

C. ELWOOD HANNA, being duly sworn, testified:

Examined by Mr. MCCAUGHEY:

I reside in Philadelphia, and am employed as clerk in the credit department of Merchant & Co. I have been employed by Merchant & Co. for nine years. I know Charles Coates, of Pontiac, Michigan, only in a business way. He is a customer on the books. I know that Merchant & Co. had dealings with him. His record previous to this transaction was good. On September 4th, 1902, material amounting to $141.58 was sold to Charles Coates. This invoice was settled on September 2nd by a note maturing December 30th, 1902. At the maturity of the note it was returned from the bank unpaid. We further shipped him material under date of December 3rd, amounting to $124.38. These invoices were never paid for. We never received any complaint from Coates regarding delivery of
39 these goods. I am positive that the invoice I speak of, amounting to $141.58, was sold to him under date of September 4th. There is still due Merchant & Co. the sum of $265.96, both of the two above mentioned invoices, and it has been due and payable since sixty days after the above dates. I had no knowledge of the fact that at the time credit was extended to Coates, the Pontiac Savings Bank was holder of a mortgage executed by Coates. If we had known of it we would have refused to extend any credit.

## EXHIBIT A.

*(Statement of Merchant & Co. Against Charles Coates. Unnecessary Parts of Heading Omitted.)*

| | | | | |
|---|---|---|---|---|
| 1902. | | | | |
| Sept. 4. | 10 Bxs. I. C. 20 x 28 O. X. D.. | 12.90 | 129.00 | |
| | 101 # ware ½ x ½ solder..... | 17.65 | 17.83 | |
| | 25 #¾ B. W. Nails..... | .05 | 1.25 | |
| | Less Frt. 2200 # Tin 27..... | 5.94 | 148.08 | |
| | " " 140 Bal. 40..... | .56 | 6.50 | |
| | | | | 141.58 |
| Dec. 3. | 10 Bxs. I. C. 20 x 28 O. S. C. Terne ..... | 12.90 | 129.00 | |
| | 25 #⅞ B. W. Nails..... | .05 | 1.25 | |
| | Boxing ..... | | .15 | |
| | | | 130.40 | |
| | Less Frt. 2230# 27..... | | 6.02 | |
| | | | | 124.38 |
| 9. | Interest on overdue a/c..... | | | .58 |
| 1903. | | | | |
| Jan. 6. | Note dated 12/1 due 12/30 #323 returned unpaid..... | | | 141.58 |
| | | | | 408.12 |
| 1902. | Credit. | | | |
| Dec. 4. | By Cash ..... | .58 | .58 | |
| 2. | Note due 12/30..... | | 141.58 | 142.16 |
| | | | | 265.96 |

The following is a copy of a promissory note given by Coates to Merchant & Co., which it attached to the proof of claim of Merchant & Co., filed in the bankruptcy proceedings:

40 $141.58. DECEMBER 1, 1902.

Thirty days after date I promise to pay to the order of Merchant & Co.
One hundred & forty-one — Dollars
At Pontiac Savings Bank
Value received with interest at the rate of 7 per cent. per annum.

CHAS. COATES.

No. —. Due 12/31.

Endorsements: Merchant & Co., J. A. McKee.

On September 16th, 1904, the following stipulation was duly made and filed:

## Exhibit 9.

In the District Court of the United States for the Eastern District of Michigan.

Detroit Trust Company, a Michigan Corporation, Trustee of the Estate and Effects of Charles Coates, Bankrupt,

vs.

Pontiac Savings Bank, a Michigan Banking Corporation, and Charles Coates.

In this cause it appearing that when the depositions of John A. Bernhard, of Rochester, New York, and W. W. Decker, of Cleveland, Ohio, were taken, no question or questions were asked of said witnesses with reference to any knowledge upon their part prior to September 9th, 1902, that a chattel mortgage had been given prior to that time to the Pontiac Savings Bank by the said Charles Coates, or whether any notice thereof had prior to September 9th, 1902, been given to the said Bernhard and said Decker.

In order to save the expense of taking new depositions it is conceded by counsel for the defendants that had such questions been put to the said Bernhard and to the said Decker, both the said Bernhard and the said Decker would have answered under oath upon the taking of said depositions, that neither of them had any
41–44 knowledge or notice of the existence of said chattel mortgage prior to September 9th, 1902.

It is hereby stipulated that this stipulation shall take the place of the sworn testimony of the same Bernhard and said Decker in this cause upon the points covered by this stipulation.

Dated Detroit, Mich., September 16, A. D. 1904.

(S'g'd) BERNARD B. SELLING,
*Attorney for Plaintiff.*

(S'g'd) E. R. WEBSTER,
*Attorney for Defendants.*

(S'g'd) H. GEER,
*Of Counsel.*

* * * * * * *

45 *Opinion on Question of Jurisdiction Certified by Referee.*

In the District Court of the United States for the Eastern District of Michigan, Southern Division.

No. 1.

DETROIT TRUST COMPANY, Trustee, Complainant,
vs.
PONTIAC SAVINGS BANK and CHARLES COATES, Defendants.

On Question Certified by Referee.

Bernard B. Selling, for complainant.
E. E. Webster and Harrison Geer, for defendants.

SWAN, *J.:*

The Bill of Complaint in this cause was filed September 14th, 1903. Defendants entered a general appearance, and November 10th, 1903, filed answers. Neither answer protested against the jurisdiction of the court, but both pleaded to the merits of the case set forth in the bill. Since the filing of the replication in the cause November 18th, 1903, nine stipulations have been made and filed extending the time to take proofs, and ten or more depositions have been taken by the parties in 1904 without objection. Thereafter and on April 19th, 1905, the defendants objected inter alia "to any testimony * * * for the reason that * * * this court has acquired no jurisdiction * * * and because defendant, the Pontiac Savings Bank, has not consented to its jurisdiction." The Referee has certified the determination of the question to the court.

The objection to the jurisdiction came too late and was waived by defendants' appearance and answer and its recognition of the jurisdiction thereby and by the stipulation mentioned and the depositions taken. These acts were practically its consent to the jurisdiction.

Bryan vs. Bernheimer, 181 U. S. 197.
Texas & Pac. R. R. Co. vs. Cox, 141 U. S. 109.

The objection of the defendants is overruled, and the Clerk will so certify to the Referee.

(S'g'd) HENRY H. SWAN,
*District Judge.*

Dated, Detroit, March 12th, 1906.

* * * * * * *

46 On September 27th, 1907, the following evidence was introduced before Harlow P. Davock, special examiner, B. B. Selling and John W. Anderson appearing for the complainant herein, and Elmer R. Webster and Harrison Geer appearing for the Pontiac Savings Bank.

Counsel for complainant offered in evidence the petition in bankruptcy filed February 16th, 1903, in the matter of the petition of Buhl Sons & Co. and others to have Charles Coates adjudged a bankrupt, case No. 622. He also offered in evidence the subpœna in the same cause, returnable February 26th, 1903, showing personal service on the 16th day of February, 1902. He also offered in evidence the appearance of Charles Coates, and his consent to be adjudicated a bankrupt, filed March 6th, 1903. It was stipulated and agreed between counsel that the adjudication was entered on March 6th, 1903, and that a reference was had to Mr. Davock in due course upon the same day, and that upon May 8th, 1903, the Detroit Trust Company was elected trustee and therefor duly qualified.

47 The following is Schedule A, containing list of creditors whose claims are unsecured, from the schedules in bankruptcy of said Coates:

*Schedule A* (3)—*Creditors Whose Claims Are Unsecured.*

Special Instructions: When the name and residence (or either) of any drawer, maker, indorser, or holder of any bill or note, etc., are unknown, the fact must be stated, and also the name and residence of the last holder known to the debtor. The debt due to each creditor must be stated in full, and any claim by way of set-offs state- in the schedule of property.

Give reference to ledger or voucher; names of creditors; residences (if unknown, that fact must be stated); when and where contracted; nature and consideration of the debt; and whether any judgment, bond, bill of exchange, promissory note, etc., and whether contracted as partner or joint contractor with any other person; and, if so, with whom.

| | Amount. $ cts. |
|---|---|
| Boydell Bros., Detroit, Mich., 1902, account | 18.95 |
| Mich. Stove Co., Detroit, Mich., 1902, account | 11.06 |
| John M. McKerchy, Detroit, Mich., 1902, account | 3.93 |
| Sales & Broad, Detroit, Mich., 1902, account | 8.92 |
| Detroit Gas Lamp Co., Detroit, Mich., 1902, account | 10.40 |
| Merril & Co., Toledo, Ohio, 1902, account | 4.80 |
| Co-Operative Foundry Co., Rochester, N. Y., 1902, account | 454.96 |
| Moore Bros., Jamestown, N. Y., 1902, account | 14.20 |
| P. D. Beckwith, Dowagiac, Mich., 1902, account | 471.38 |
| Hunt, Roehrig & Noah, Detroit, Mich., 1902, account | 26.07 |
| American Wringer Co., New York, 1902, account | 28.13 |
| Schroeder P. & G. Co., Detroit, 1902, account | 22.23 |
| Ford Auger Bit Co., Holyoke, Mass., 1902, account | 21.45 |
| Hibbard, Spencer & Bartless, Chicago, 1902, account | 118.86 |
| A. Harvey & Sons, Detroit, 1902, account | 114.77 |
| Bonnett Nance Stove Co., Chicago Heights, Ill., account | 392.76 |
| Standard Oil Co., Detroit, 1902, account | 5.00 |

| | | |
|---|---|---|
| | Bennett Furnace Co., Cleveland, 1902, account..... | 9 |
| | Independent Register Co., Cleveland, 1902, account.... | 3 |
| | Det. Lead P. & S. Wks., Detroit, 1902, account..... | 1 |
| | Wm. T. Dust, Detroit, 1902, account..... | 1 |
| | Standard Lighting Co., Cleveland, 1902, account..... | 5 |
| | Morley Bros., Saginaw, 1902, account..... | 9 |
| 48 | Buhl Sons & Co., Detroit, 1902, account..... | 74 |
| | W. J. Burton & Co., Detroit, 1902, account..... | 5 |
| | Merchant & Co., Philadelphia, Pa., 1902, account..... | 26 |
| | Arcade Mfg. Co., Freeport, Ill., 1902, account..... | 3 |
| | Cleveland Co-Operative Stove Co., Cleveland, account.... | 58 |
| | Columbus Varnish Co., Columbus, O., 1902, account.... | 7 |
| | J. W. Fales, Detroit, 1902, account..... | |
| | Griffon Cutlery Co., New York, 1902, account..... | 1 |
| | Harris Paper Co., Detroit, 1902, account..... | |
| | Lockwood Mfg. Co., South Norwalk, Conn., 1902, account | |
| | Meriden Cutlery Co., Meriden, Conn., 1902, account.... | 4 |
| | Safety Furnace Pipe Co., Detroit, 1902, account..... | 4 |
| | Wheeling Corr. Co., Wheeling, W. Va., 1902, account... | 3 |
| | H. J. Weible, Delphos, Ohio, 1902, account..... | 1 |
| | Total..... | $3,982 |

(S'g'd) CHAS. COATES, *Petitione*

The schedules were duly signed by Charles Coates, the bankr and were duly sworn to by him before a notary public. They bound together with a manuscript cover, upon which is endo the name of Elmer R. Webster as attorney for bankrupt, who previously appeared in the bankruptcy proceedings for the ba rupt.

WALTER TIDBALL, being duly sworn as a witness for compl ant, testified:

Examined by Mr. SELLING:

I live at Pontiac, Michigan, and am in the hardware busin The name of my firm is Tidball & Parmeter. My business in 1 was the same. In 1902 I was in the wood and coal business Flint. I know Charles Coates. I first met him in the latter p of November, 1902, I think the day after Thanksgiving. I do know where Charles Coates is now. I cannot remember how l it is since I have seen him. I do not know that I have seen him the past three years. He has not been in Pontiac that I know of

Q. You bought a stock of hardware from Mr. Coates at one ti did you not?

Mr. GEER: I object to that as incompetent and immaterial for reason that none of the creditors mentioned in the bill
49 complaint had any lien upon any of the property belong to the bankrupt Coates prior to the sale mentioned in question asked by Mr. Selling and for that reason the trustee is in position to question the validity of the sale if any sale was ma

A. Yes, I did.

That stock of hardware was located at 42 North Saginaw Street, Pontiac. I started to negotiate for the sale of this the day after Thanksgiving, 1902. It was in December, 1902, that we agreed upon the terms, but I do not just remember the day. We commenced to inventory the stock January 5th, 1903.

Mr. GEER: It is understood that the same objection is made to all questions pertaining to the sale of the stock from Coates to Tidball & Parmeter.

We completed the inventory on January 10th. We bought the stock on a cash basis; the stock was bought at ninety cents on the dollar of the inventory. The purchase price amounted to something over $5,000, after we had finished the inventory, $5,187.36, after the percentage was taken off. I get those figures from the bill of sale I got from Mr. Coates.

Exhibit 1, the bill of sale referred to, offered in evidence.

EXHIBIT 1.

Know All Men by These Presents, That I, Charles Coates, of the City of Pontiac, in the County of Oakland and State of Michigan, of the first part, for and in consideration of the sum of fifty-one hundred eighty-seven and 36/100 dollars, lawful money of the United States, to me paid by Walter Tidball and Fred A. Parmeter, co-partners under the firm name of Tidball & Parmeter, of the second part, the receipt whereof is hereby acknowledged, have bargained and sold, and by these presents do grant and convey, unto the said parties of the second part, their executors, administrators or assigns, all the following goods and chattels, to wit: All the stock of hardware, tools, fixtures, and tin shop supplies now at 42 North Saginaw Street in Clinton Hall Block belonging to me and now in my possession at 42 North Saginaw Street in the City of Pontiac, Mich.

To Have and to Hold the same unto the said parties of the second part, their executors, administrators and assigns, Forever. And the said party of the first part, for himself, his heirs, executors and administrators, does covenant and agree to and with the said parties of the second part, their executors, administrators and assigns, to Warrant and Defend the sale hereby made of said property, goods and chattels, unto the said parties of the second part, their executors, administrators and assigns, against all and every person or persons whatsoever.

In Witness Whereof, I have hereunto set my hand and seal this 12th day of January, A. D. 1903.

CHAS. COATES. [L. S.]

Signed, Sealed and Delivered in presence of
J. H. PATTERSON.
ADA F. HUBBARD.

On the back of the bill of sale is a certificate that it had been filed January 12th, 1903, at 10:30 o'clock a. m. with F. O. Thompson, City Clerk.

Q. What if anything, do you know about a chattel mortgage being on the stock of Charles Coates; the stock you were negotiating for; a mortgage running to the Pontiac Savings Bank?
A. I did not know anything of it until the afternoon of the 10th.
Q. How did you find out about it?
A. Mr. Coates informed me.
Q. Did you know the amount of it?
A. I did not. He told me at the time.
Q. What did you then do when you learned of the mortgage?
A. I went across to the bank.
Q. The Pontiac Savings Bank?
A. Yes.
Q. What did you do there?
A. Asked the amount of the mortgage.
Q. Do you remember what person you asked?
A. I cannot say who it was I did ask.
Q. Did you get the information?
A. I got the information; the amount of the mortgage.
Q. Then what did you do?
A. Finished up the inventory.
Q. After you had agreed upon the amount with Mr. Coates, I understand the stock was inventoried by a third party. What did you do in regard to paying for it?
A. I paid cash for it.
Q. How and when?
A. That same evening of January 10th at the Pontiac Savings Bank.
Q. To whom at the Pontiac Savings Bank did you pay it?
A. I cannot tell now; some of the officers of the bank, but I do not know who accepted the money.
51 Q. How did you happen to pay it to the Pontiac Savings Bank?
A. Because they were holding the mortgage and I wished to have the mortgage discharged by them.
Q. What interest, if any, did you have in the indebtedness of Charles Coates to the Pontiac Savings Bank other than the fact that it was a lien upon the stock?
A. None whatever.
Q. What, if any, arrangement did you make with Mr. Coates as to paying this money to the Pontiac Savings Bank?
A. Made no arrangement with Mr. Coates.
Q. Did you tell him you were going over to the Pontiac Savings Bank to pay it?
A. It was his wish.
Q. What, if anything, took place that evening at the bank when you paid the money?
A. Not anything that I know of.

Q. What, if anything, was said about the mortgage?
A. I got a receipt from the bank to clear the stock for the amount ney held against it.
Q. Have you that receipt with you?
A. Yes, sir.

Receipt shown and marked Exhibit 2.
Mr. SELLING: I offer Exhibit 2 in evidence.
Mr. GEER: Same objection.

EXHIBIT 2.

PONTIAC, MICH., Jan. 10th, 1903.

Received of Charles Coates, through Tidball & Parmeter, two housand one hundred twenty dollars and fifty cents, in full settlement of the claim of this bank against stock of hardware owned by Coates.
$2,120.50.

PONTIAC SAVINGS BANK,
D. H. POWERS, *President.*

Q. Did you see Mr. Powers sign this?
A. I did not.
Q. By whom was this handed to you?
A. I don't know; it was handed to me in the bank.
Q. What if anything was said about discharging the mortgage?
A. The officer in the bank said the mortgage would be discharged onday morning following.
Q. Do you know whether the mortgage was discharged?
A. Cannot say.
Q. The bill of sale which has already been offered in evidence was received by you on the date it bears or a different ate?
A. The date it bears date.
Q. That is the following Monday?
A. Yes, the following Monday morning.
Q. Did you pay the full amount for the stock into the bank or to r. Coates?
A. To Mr. Coates in the presence of one of the bank officers.
Q. And did you see the money paid to the bank?
A. I saw it all turned over into the bank.
Q. The whole of it?
A. Yes.
Q. When was that?
A. On the 10th of January, that evening.

Mr. SELLING: Is there any question, gentlemen, but that the ortgage referred to by this witness is the same mortgage as deribed in the bill of complaint?
Mr. GEER: I don't know. I have not been looking for the bill of mplaint.

Q. Do you know where the original chattel mortgage is?
A. No, I do not.
Q. What, if any interest did you have in paying the debt of Charles Coates to the Pontiac Savings Bank?
A. None.
Q. Why did you want to see it paid?
A. I wanted the mortgage discharged.
Q. Did you have any other reason?
A. No, sir, only to get the lien off the property.

Mr. GEER: I move that the court strike out all the evidence given by the witness in relation to the purchase and payment of stock of goods made from Coates, the bankrupt, for the reason that testimony is incompetent and immaterial because none of the creditors represented in the bill of complaint filed by the trustee had any claim or lien upon the stock of goods in question; for that reason the trustee is in no position to question the validity of the chattel mortgage.

Mr. DAVOCK: I deny the motion to strike out with exceptions to Mr. Geer, and also with exceptions to Mr. Geer for any and all questions asked of the witness.

Cross-examination.

By Mr. GEER:

I began negotiations with Coates on the day after Thanks-
53 giving, 1902. Those negotiations continued until the latter part of December, I cannot tell just the date. They continued for about one month. We commenced taking inventory January 5th. We really made the bargain along in December, had the papers drawn up as to what basis the goods were to be sold on. We told him we would take it the day after Thanksgiving, 1902. The agreement was made that day. We were to begin taking stock January 5th. The talk we had with him about it during December was sometime the latter part of December. There were papers drawn up for the agreement, as to how the stock was to be sold. I did not see Coates any time between Thanksgiving and the latter part of December. Our bargain with Coates was that the goods were bought on the basis that we were to inventory the stock on January 5th. That contract was put in writing the latter part of December. He continued to sell goods after the making of that contract until January 5th. We concluded inventorying on January 10th; the store was closed during that week.

Counsel for complainant offered in evidence the depositions of Mertz, Brayer and McCarthy above set out; also depositions of Decker above set out; also depositions of Raiguel, Walton and Hanna above set out; also the deposition of Beach above set out. Counsel also offered in evidence the notice given on July 11th, 1904, to Mr. Webster of the filing of these depositions.

Counsel for complainant also offered in evidence Exhibit 9, the stipulation as to certain depositions above set out.

Counsel for complainant also offered in evidence the schedules in

ankruptcy of the bankrupt, Charles Coates, especially Schedule A. He also offered in evidence the proof of claim of the Co-Operative Foundry Co., of Rochester; the proof of claim of the Cleveland Co-Operative Stove Co., the proof of claim of the Estate of P. D. Beckwith, and the proof of claim of Merchant & Co.

Mr. SELLING: I would like also to have it noted that the three claims of Hibbard, Spencer & Bartlett & Company, Standard Oil Company and the American Stove Company, Cleveland, Ohio, referred to in the eighth paragraph of the bill of claim, were by those respective creditors, being too small to warrant the expense of taking depositions. I offer, however, the proofs of claim of those three creditors also.

Mr. GEER: These are all objected to as incompetent and immaterial and in no way in power of the trustee to support the bill filed to set aside the mortgage by Coates to the defendant's bank.

4 On September 16th, 1908, the taking of testimony before the Special Examiner was resumed, B. B. Selling appearing for the complainant, and Harrison Geer and Elmer R. Webster appearing for the Pontiac Savings Bank.

Mr. SELLING: At the conclusion of the taking of the testimony at the last hearing, I put the question to you, which the stenographer took down, but did not take down your answer. I asked, Will it be conceded, gentlemen, that the trustee in bankruptcy has received no assets from the bankrupt or any other source, as appears by the records filed herein. In the reports of the trustee it shows that although no dividend has ever been paid to creditors, the trustee has a negative balance of $9.05, and the trustee has never received any funds, if that will be conceded that will save us the trouble to bring over the officer of the Detroit Trust Company.

Mr. GEER: It will be conceded that the trustee has no funds to pay creditors and no money to pay administration expenses.

On September 24th, 1908, the taking of testimony before the Special Examiner was resumed, the same solicitors appearing for the respective parties.

CRAMER SMITH, being duly sworn as a witness for the defendant, the Pontiac Savings Bank, testified:

Examined by Mr. GEER:

I reside in Pontiac, Mich., and am connected with the Pontiac Savings Bank. I am its cashier, and have held that position since January, 1902. I know of the bank having a chattel mortgage given by Charles Coates, bearing date May 19th, 1902. The amount of his indebtedness was $2,300. That indebtedness was evidenced by a note of Charles Coates. It was created on January 18th, 1900, the amount of the note was $2,300. The mortgage given to secure that indebtedness was dated May 19th, 1902. The mortgage bears date May 19th, 1902, and was given for $2,300. That was the amount of the indebtedness with some accumulated interest. Coates actually owed the bank that amount of money on that date; on money loaned him *on* January, 1900. After the mortgage was given, it was deliv-

ered to the bank. As cashier of the bank I took charge of the mortgage. I do not just recollect who took it over to the Clerk's office to have it filed. I could not state positively whether I took it or someone else took it. It remained in the possession of the bank from the time it was given on May 19th, 1902, until September 9th, 1902.

Q. I will ask you whether there was any arrangement made between Mr. Coates and you or any officer of the bank to withhold it from record?

55 Mr. SELLING: I object to that as incompetent, irrelevant and immaterial.

A. No, sir.

From the time that mortgage was filed up to January 10th, 1903, Mr. Coates had made some payments on the note, I have not the record here of the amounts. I recollect that on January 10th, 1903, he, or Tidball & Parmeter for him, paid to the bank the balance due on that mortgage. The amount paid was $2,120.50. That was the balance due at that time. I gave him credit for all payments made on the note and mortgage prior to that date. I was the cashier at the time the mortgage was taken. I had charge of the transactions between Coates and the bank. When I took that mortgage I had no knowledge of his insolvency or the condition of his indebtedness. I was not aware at that time that he was unable to pay his debts in full. Nothing was said by him to me that would in any way lead me to suppose or believe that he was insolvent at that time. At the time he made the payment to me on January 10th, 1903, I took for granted his ability to pay his debts in full. At that time I had no knowledge of his inability to pay his debts. The first information I ever had that Mr. Coates was insolvent was sometime later, just prior to the bankruptcy proceedings. I do not recollect just how long, but it was sometime after the sale, then of course accounts began to show up and we then received notice of his indebtedness; we had no knowledge of it before. At the time I took the mortgage, I had no knowledge of what his indebtedness was, or in fact any statement from him, and we supposed he had saved and was in good condition.

Q. What knowledge, if any, did you have at the time that Tidball & Parmeter paid you the money as Mr. Coates directed as to the extent of his indebtedness to the parties to whom he was indebted?

A. We had no other knowledge than our own transaction, possibly some few accounts that we might have known about, but nothing to any extent beyond what he could pay.

Q. Did you have any means of receiving any information from him or from any other source, informing you of the extent of his liabilities on January 10th, 1903, when this note and mortgage was paid?

A. Not beyond his ability to pay, no, sir.

I learned of the fact that Mr. Coates had sold out to Tidball & Parmeter. That sale was consummated on or about January 10th, 1903. I could not tell positively how much Tidball & Parmeter paid

Mr. Coates, but I recollect it was over $5,000. The money was deposited in our bank by Mr. Coates when he received it from Tidball & Parmeter. Out of that $5,000 Coates paid . I recollect Mr. Coates gave us his check out of that amount; it as done at the same time. I could not state positively without the cord how long the balance of the $5,000 remained in the bank to e credit of Mr. Coates, but for a few days, possibly ten days; by amining the records I can tell. There were some checks paid t which we honored against the amount, different checks; it was id out on his checks, not in one amount but at different times in fferent amounts.

Cross-examination.

By Mr. SELLING:

That mortgage was taken on May 19th, 1902, to secure a note. here was nothing about its being taken at that particular time more an is customary in a good many cases. We wanted security at this ne because it had been running some time and we desired security. had been running something over a year. There was no special ason for taking the mortgage at that particular time, nothing more an to get security.

Q. Why, then, if you wanted security, didn't you record the mort-ge at that time?

A. I don't recollect the reason now, we merely took the mortgage.

Q. Do you mean to say that it is customary for your bank to take chattel mortgage on stocks of merchandise, and not record the ortgage?

A. It isn't absolutely customary with us.

Q. Had you ever done it before?

A. Occasionally, yes.

Q. Remember any special instance where you did that before?

A. Yes, sir.

Q. How long before was that?

A. We have a case now.

Q. Where you have an unrecorded chattel mortgage?

A. Yes, sir.

Q. Who was attorney for the bank at that time?

A. Mr. Webster.

Q. Was he consulted with reference to putting that mortgage on ord?

A. I don't recollect.

Q. How did you happen to put that mortgage on record on Sep-mber 9th?

A. I think the matter was talked over with our people and it was thought best to record it—by the Board of Directors.

It was talked over by the Board of Directors because upon those matters we go over our books. A. W. Dixon is savings ler. He was one of the witnesses to the mortgage and I was the ier. With reference to that mortgage, which was in my possession, lid not put it on record until the directors of the bank instructed

me to do so, something to that effect, I do not just recollect the conversation. I did no- think of the fact that in the hardware business the best season for the sale of hardware was in the fall and that it was during the summer that merchants got their stock in. I knew that a man had a greater stock in the fall. I suppose I knew that at that time, the period between the first of May and the first of September. It was during that period that this mortgage was not put on record. There was no one particular reason for putting it on record September 9th, 1902, other than there was on May 19th, 1902, nothing more than that the matter had not been taken up. I did not notify any of the creditors who were doing business through our bank that we had a mortgage. It did not occur to us as necessary to notify them.

Q. You were getting drafts right along from Buhl Sons & Company for Mr. Coates, $200 to $300 a month, passing through your bank, didn't you think it worth while to notify them that you held a mortgage on the stock?

A. No, sir, it didn't occur to us as necessary.

Q. Why wasn't the mortgage recorded if you had any idea about his condition—you had the note?

A. True.

Q. Then you wanted security on the stock?

A. That is what we got.

We had the note and we got security on the stock. It is my impression that it was on the evening of January 10th, 1903, when it was paid. It was not Tidball & Parmeter's check. I think the total amount of the sale was deposited to the account of Mr. Coates in order to make a report on his account, I think the receipt was made in that form at the request of Mr. Tidball to show it had been paid. That was received from Mr. Coates through the sale. I think the receipt was made that way for purposes already stated. Possibly Mr. Tidball said, "We want that mortgage discharged and we are going to pay you the amount of that mortgage." That amount was paid in the presence of Mr. Coates in our bank; it was paid to Mr. Hale. Mr. Hale held no office at that time. He was working in the bank, and he signed E. H. Power, per Hale. It was paid to Mr. Hale anyway.

Mr. GEER: It was paid in this way and deposited in Mr. Coates' name, and Mr. Coates afterwards gave him a check
58 for the amount of the claim, that is why you recall it isn't it?

A. Yes, sir.

I think the money went into the bank Saturday night and was there a few days. I would not say positively without the books. I do not think it is a fact that he drew money out in cash on his checks and took it over to Windsor; I think he purchased a draft with his check, that is my recollection. I think we got a check from Mr. Coates for the amount of that mortgage, for that particular amount at the same time it was paid, at the same time this receipt was given to Tidball & Parmeter. I did not receive that check for that amount from Mr. Coates before I gave that receipt to Tidball & Parmeter.

It was done at the same time. They were all in the room around the table and the business was transacted there in the presence of the three parties, Tidball, Hale and Coates, but I do not know now just in what order it was taken up.

I do not recollect any inquiry now that I made of Mr. Coates at the time we took the mortgage. I did not make any at the time I put the mortgage on record. I had no statement from Mr. Coates as to his financial condition. I do not remember ever seeing any. There might have been a verbal statement made when the loan was made. I do not know where Mr. Coates is now. I last saw him shortly after the sale. I do not just remember when it was he went away. It was approximately at the time he was adjudicated a bankrupt, but I could not fix the date. I think it was about the time he was adjudicated a bankrupt. I have not seen him since then. I have no idea where he is, no more than that I have heard people say he is in Canada.

On January 15th, 1909, the taking of testimony before the special examiner was resumed, the same counsel appearing for the respective parties.

THOMAS J. GREEN, being duly sworn as a witness for the complainant, testified:

Examined by Mr. SELLING:

I reside in Detroit, and have lived here since 1882. At the present time I am in the traveling business. In June, 1902, I was a retail stove dealer at 102 Michigan Avenue, Detroit. I sold out my business sometime in 1905. Mr. Dennis was my clerk and I sold out to him, and he remained under that lease for some six months when he removed to another location. He was not successful there and the creditors took charge of his business and sold it out. Those accounts were in the nature of loose leaf and the accounts I left there with some other accounts went with Mr. Dennis out in Iowa. My proof of claim in this matter was made out in February, 1904. In June, 1902, I furnished the goods that appear on that invoice attached to my proof of claim to Charles Coates of Pontiac.

Proof of claim and the invoice attached to it offered in evidence.

The Sun Stove Company, in order for me to get a price, required me to take 200 stoves and I could not market them all in my place, and I asked some of the salesmen if they could find me anybody who wanted some of those stoves. One of the salesmen I think told me that I might sell some of them to Mr. Coates, and I wrote him a letter and quoted him prices and I shipped those stoves. I had them shipped from the factory of the Sun Stove Company. I telephoned up to them to ship so many of the stoves consigned to me to Charles Coates. I paid the Sun Stove Company for them. Exhibit A is the shipping receipt from the Sun Stove Company for fifteen crated stoves. That was the shipment of June 20th.

I can testify that Mr. Coates received the stoves and he don't deny the claim, so that is good evidence that the stoves came. I recollect talking with Mr. Coates about the claim. He said he received the stoves and would pay. He did not pay, not any part of it. At the time Charles Coates went into bankruptcy he was indebted to me for stoves sold him in June, 1902, in the sum of $44.30.

I never knew that the Pontiac Savings Bank had a chattel mortgage upon the stock of Charles Coates.

*Copy of Invoice Attached to Green's Proof of Claim.*

DETROIT, MICH., July 1, 1903.

Mr. Chas. Coates, Pontiac, Mich.:

Bought of T. J. Green, General Hardware, Stoves, 103 Michigan Avenue. Telephone 3311.

| 1902. | | | | |
|---|---|---|---|---|
| June 20 | 12 | #82 Faultless Junior Gasoline Stoves..2.40 | | $28.80 |
| | 4 | 02 Faultless Junior Gasoline Stoves..2.25 | | 9.00 |
| | 2 | 03 Faultless Junior Gasoline Stoves..3.25 | | 6.50 |
| | | | | $44.30 |

60 On January 21st, 1909, the taking of testimony before the special examiner was resumed, the same counsel appearing for the respective parties.

FRANK H. HALE, being duly sworn, as a witness for the defendant, the Pontiac Savings Bank, testified:

Examined by Mr. GEER:

I live at Pontiac, Michigan, and at this time I am vice-president of the Pontiac Savings Bank. I have been connected with that bank since November 1st, 1902. I know Charles Coates, who was engaged in business at Pontiac about 1902 or 1903. I remember of his selling his stock of goods to Tidball & Parmeter.

Q. State whether or not the money he received from Tidball & Parmeter from that sale, to your knowledge, was deposited in the Pontiac Savings Bank?

Mr. SELLING: I object to it as incompetent, irrelevant and immaterial.

Q. And state whether or not you can and will produce the original deposit slips?

A. Yes, sir.

Q. And by whom was that deposit slip made?

Mr. SELLING: I object to that for the same reason——

A. This deposit slip was made out by myself?

Q. State when that was made with reference to the time when the money was deposited in the bank?

A. At the very time.

Q. How much money was paid by Tidball & Parmeter for which Mr. Coates took credit at the bank?

A. $5,187.36.

(Marked Exhibit 20.)

Q. And what date was that deposited in the bank to Charles Coates' credit?

A. January 10th, 1903.

Mr. SELLING: All these questions are under my exception?

REFEREE: Yes, sir.

Mr. GEER: This was the understanding as I shall produce the original papers for the purpose of determining whether or not it was deposited to Mr. Coates' credit.

Q. I show you Exhibit 21 and ask you what that is?

A. That is a copy of the account of Charles Coates.

Q. Look at that and see if it is not the original?

REFEREE: Is that the original?

A. My judgment is that it is a copy, that may be the original, I didn't do this, it isn't in my handwriting, seems to me as if the cashier produced that in a former examination.

31 Mr. SELLING: I will concede it, for no need of bringing the original ledger leaf, that is a true copy, but I do not waive my objection that it is immaterial, incompetent and irrelevant.

The checks noted on Exhibit 21 would be delivered to Mr. Coates. It speaks of five checks. Those would be checks drawn against that account by Mr. Coates. The total of the five checks amount to $4,546.33. Those checks were charged in Mr. Coates' account of January 12th, 1903. Naturally that would be the date he withdrew the money; it was on Monday. I am unable to state to whom those checks were made payable without seeing the checks. On the 13th he checked out $231.03, on the 15th he checked out $479.24, and on the 17th he checked out $20.48. That was in excess of his account at that time. He made that good on the 21st by a deposit of $57.05. Without seeing the checks I would be unable to determine to whom that $4,546.33 was paid.

Cross-examination.

By Mr. SELLING:

$4,546.33 was charged up by the bank on January 12th. I did not say it was paid out on the night of January 10th, I do not know when it was paid out, between closing hours Saturday night—it was paid out between closing hours on Saturday at 4 o'clock and Monday at closing. I mean the closing hours of January 10th at 4 o'clock and Monday, January 12th at 4 o'clock. Tidball & Parmeter did not insist right then and there at the time that money was paid in by them that our mortgage should be paid immediately and

before any credit was given to Mr. Coates. Tidball & Parmeter gave me checks for $5,187.36. They were given to me for Mr. Coates; they were certificates and drafts on Flint. I do not recollect to whom they were payable but I presume to each one of the individuals who had money on deposit. I do not think Mr. Coates's name appeared on them at all.

Q. You stated in the answer filed in this cause and signed by you, that is your signature is it not?

A. Yes, sir.

Q. "That this defendant admits that Tidball & Parmeter and Mr. Coates went to this defendant's bank, January 10th, 1903, and that Mr. Tidball then and there paid to this defendant $2,120.50 in full satisfaction of said chattel mortgage."

A. They put the money to his credit, $5,187.36.

62 Q. But you know that they understood that their mortgage would be discharged that very night and that was the purpose of going to the bank?

A. It was not discharged that night.

Q. Didn't you give them a receipt wherein you admitted full satisfaction and said you would file a discharge on Monday morning?

A. I received a check from Mr. Coates which was charged against his account.

Q. You would charge against this deposit?

A. Mr. Coates' account.

Q. There wasn't anything in Mr. Coates' account except $15.15 was there, at that time?

A. Prior to the deposit?

Q. Yes, sir.

A. That is exactly right.

Q. So that check for over $2,000 of Mr. Coates' wasn't any good unless it came out of this special fund?

A. That is correct.

Q. That was the form in which you put through the transaction, is that not the fact?

A. I first gave him credit for the $5,100 and then I went and got the note, figured the interest, entered it up, and came back and took his check for that amount of money.

Q. Do you mean you first entered that deposit before you figured up what that was?

A. Yes, sir. I naturally would.

Q. Is it not a fact that Mr. Tidball made you figure up the exact amount that you had coming on the loan on the stock before he deposited a dollar there?

A. I don't remember whether he did or not.

Q. Is it not a fact that you executed to Tidball & Parmeter a receipt at the very time that you took in this deposit reading as follows:

Mr. SELLING (reads the receipt given for the $2,120.50 as follows):

"PONTIAC, MICH., Jan. 10th, 1903.

Received of Charles Coates, through Tidball and Parmeter, two thousand one hundred twenty dollars and fifty cents in full settlement of the claim of this bank against stock of hardware owned by C. Coates.

$2,120.50. PONTIAC SAVINGS BANK.
D. H. POWERS, *President.*"

Mr. Powers in my presence did not execute that receipt. Mr. Powers was not present. I executed the receipt. While it is signed Pontiac Savings Bank per D. H. Power, president, I did it myself. I signed Mr. Power's name. While it is signed in the name
63 of D. H. Power, the receipt was written out by F. H. Hale. That was on January 10th, 1903. I do not know whether Mr. Tidball insisted upon having that receipt so that the stock would be free and clear of liens. I presume Mr. Tidball stated to me that he wanted to see that mortgage paid, and that that was the reason he came over himself, but I do not remember that. The bank received a check immediately following the depositing of this money for the amount of the mortgage, $2,120.50. It was hardly simultaneous. We would naturally take the deposit and enter it on the books to his credit and then take his check for it. In this instance I would probably follow out the natural course of business. I do not know whether Mr. Coates had a check with him that night. It might be that I gave him one of the bank's checks. The deposit slip was made out Saturday night. The check from Mr. Coates for that amount was received immediately following. There might have been an interval of five minutes, two minutes or ten minutes between the putting of that deposit slip on the spindle and the issuance of this check. I could not compute the interest in five seconds. I cannot remember whether the interest was figured on this before Mr. Tidball paid that money in. I naturally made out the credit entry upon this note, and took the check and canceled it. It would be endorsed on our books first, the note, number, and interest, and then we would get his check covering the whole amount. My recollection as to the general details that took place is not very clear, but the general transaction is very clear; the small details I would not remember.

My recollection is that Coates withdrew $2,000 Monday. I could not say what time Monday. Our certificate of deposit or cashier book would not show the hour. It would show the order in which it was issued. There might be bill numbers on that to show the bills. The book would show the order in which they were issued. I knew Coates drew out a certain amount sometime Monday; he had it to his credit. I do not know what he did with it; I know he withdrew it. I cannot say the hour he withdrew it. I do not think Mr. Cramer Smith had any instructions about discharging the chattel mortgage; he was cashier in the bank. I presume there was an agreement that that mortgage was to be discharged first thing Monday morning; we had received our pay. I presume there was something said about discharging it. It is quite probable that it was said

that we could not get into the City Clerk's office that night but that it would be discharged the first thing Monday morning. I do not think there is any doubt about it.

64 Redirect examination.

By Mr. GEER:

At the time this money was paid over by Mr. Coates to the bank I had not the slightest knowledge of Mr. Coates' insolvency. Those checks were signed by Mr. Coates, he checked against this account after depositing the money, he gave us a check himself on that account to pay that chattel mortgage. He also gave other checks on the bank on Monday When the bank books were written up the vouchers were always returned. There would be no way I could tell you when Mr. Coates's bank book was written up.

Mr. SELLING: I offer in evidence the testimony of Charles Coates taken before Harlow P. Davock, referee in bankruptcy, upon reference made on February 17th, 1903.

Mr. MARTIN: We object to it so far as the Pontiac Savings Bank is concerned, because we have not had an opportunity to cross-examine Mr. Coates.

Mr. SELLING: The counsel who appeared for Mr. Coates is the same counsel who appeared for the Pontiac Savings Bank.

Mr. MARTIN: I don't know of any rule or anything else that would authorize this testimony to be introduced at this proceeding.

Mr. SELLING: As I understand it, you are not raising any question as to the authenticity of the testimony as transcribed.

Testimony admitted subject to exception.

Mr. MARTIN: Is there any question that Mr. Coates cannot be produced or his testimony given?

Mr. SELLING: Mr. Hale, where is Charles A. Coates?

A. I don't know.

I don't know that I have heard of him in the last six years. I have no way of knowing where Mr. Coates is. So far as I know there is no way of learning his whereabouts at the present time.

Mr. SELLING: Certain contempt proceedings were brought against him in the U. S. District Court and he immediately left for parts unknown and he has not returned?

A. Not that I know of.

I do not know where he is. So far as I know Mr. Coates may be in the City of Detroit today. I have not made any attempt to find him. I heard he originally came from Canada. I knew he said he was going back.

65 EXHIBIT 20.

The Pontiac Savings Bank.

Deposited by Chas. Coates.

PONTIAC, MICH., Jan'y 10, 1903.

Please List Each Check Separately.

| | Dollars. | Cents. |
|---|---|---|
| Currency | | |
| Silver | | |
| Gold | | |
| Checks as follows | $5187 | 36 |
| Total | $5187 | 36 |

See that all Checks and Drafts are Endorsed.

EXHIBIT 21.

The Pontiac Savings Bank, Pontiac, Mich.

Name: Chas. Coates.
Account No. —.
Sheet No. —.

| Date. | Checks in detail. | | Total checks. | Deposits. | Balance. | |
|---|---|---|---|---|---|---|
| 1903 | | | | | 69.15 | |
| Jan. 3 | | | 50.00 | | 15.15 | |
| 12 | 5 cks. | | 4546.33 | 5187.36 | 656.18 | |
| 13 | 118.33 | 112.70 | 231.03 | | 425.15 | |
| | | | | 30.10 | | |
| 14 | | | | 15. | 470.25 | |
| | 160. | 200. | | | | |
| 15 | 19.24 | 100. | 479.24 | | 8.99 | (red ink) |
| 17 | | | 48.06 | | 57.05 | " " |
| 21 | | | | 57.05 | | |

Charles Coates, the bankrupt, on his examination before the referee on February 17th, 1903, after being duly sworn, testified in part (his testimony other than relative to his indebtedness to the Pontiac Savings Bank, relative to the mortgage held by that bank,
66 relative to the sale of his stock of goods to Tidball & Parmeter, and relative to the payment of his indebtedness to the Pontiac Savings Bank, is omitted herefrom) as follows:

John W. Anderson and Bernard B. Selling appeared for creditors and Elmer R. Webster appeared for the alleged bankrupt.

I sold out in January to Tidball & Parmeter. I received $5,187

and some cents. The stock was sold at a discount on the dollar, that is, part of the stock. The stoves were sold at the invoice price and the balance of the stock at 90. The stoves were sold for over $1,900. I do not know whether it would run over $1,950 or not, it was less than $2,000 and over $1,900. The difference between $5,187 and $1,900 répresents 90 per cent. of the inventory price of the rest of the stock. I suppose $3,650 is the correct figure for the rest of the stock. Without discount, the stock inventoried between $5,500 and $5,600 including the stoves.

Of the $5,187, and the two or three hundred dollars we collected from accounts, I paid over $2,100 to the Pontiac Savings Bank. It was on the evening of the 10th of January that that was paid. It was between $2,100 and $2,200, as near as I can get at it. It was reduced to $2,050; in the first place it was $2,300, then it was reduced to $2,050, and that night I paid the interest. I paid the interest that was coming on the note that night, and the same night I paid the principal. I do not know the exact amount I paid them. I think it was by check I paid them. It was a blank check of the Pontiac Savings Bank's. That does not appear in my check book.

I deposited all of this $5,187 in the Pontiac Savings Bank on the same night, January 10th. They open the bank Saturday nights. The whole of this $5,187 was deposited in the bank and has since been checked out by myself.

I also paid a note of $2,000 to my brother Richard, who lives at Exeter, Ontario. I owed him that on a note. It was a note that was given in payment for stock in the first place. When the stock was bought there was this $2,300 that I got of the Pontiac Savings Bank and the $2,000 endorsed by my people at home. That is the note endorsed by my brother Richard. He paid that note, but I do not know when.

I had $4,000 in money when I started in business, besides $2,000 they endorsed for me. I had practically $6,000 when I started, including the $2,000 they endorsed for me. I owe pretty near $4,000, and in the way of assets have just my book accounts. I have not got the $4,000 I put in originally. I put in $4,000 in the first
67 place, and we owe pretty near $4,000 and all I have got left is my book accounts. That is what I want my creditors to believe.

I think it was in September I gave this mortgage to the Pontiac Savings Bank. I gave them a mortgage to secure this personal note, to secure the note they held against me.

I bought this stock of Zimmerman Brothers; the stock was at Pontiac when I got it. I came over to inspect the stock before I bought it. I bought it on the strength of an inventory taken at that time. I did not know when I went back to Canada how much I had to pay for the stock. I did not know anything about the Zimmerman stock before I came from Canada. I came to Pontiac and looked it over. I did not have very much money when I came over, just traveling expenses. I looked over the stock and then went back to Canada again. I saw my people there. They gave me a blank note with my mother's name and Richard's name on the back of it. The

derstanding was that it was not to be more than $2,000, that was be the limit. I did not tell them at the time that I thought I uld borrow $2,000 from the bank, or that I had seen the bank be- re. I did not think the stock would inventory over $6,000. The ventory was to be taken after I got back again, and I thought it uld be about $6,000. I then went to Pontiac and took an inven- y. The inventory ran about $2,300 beyond my expectations. I en went to the bank and got a loan and gave a demand note. I do t know as there was any security. I think they just loaned me ,300 on my personal note. I am sure of that. The stock inven- ied $8,300 and some cents. It was over $8,300. That was in nuary, 1900. All that I ever paid to the Pontiac Savings Bank up the 10th of January was the difference between $2,050 and $2,300.

On September 24th, 1903, Charles Coates, the bankrupt, after ng duly sworn, was further examined before the Referee by Mr. ling, and testified in part as follows:

I remember having given a mortgage to the Pontiac Savings Bank May 19th, 1902. That chattel mortgage was signed on that day me. It was left at the bank; that is all I know of it. It was left h the cashier, Mr. Cramer Smith, I believe. That is the same rtgage that was put on record September 9th, 1902. I did not ve any control of it from May 19th, 1902, until September 9th, 02.

Q. Was that kept off record by any arrangement with you?

A. Well, I don't know. We had a talk I believe when it was en.

Q. What was the talk?

A. I asked them if it was customary, I believe, to file those at once, or something to that effect. I can't give you the nversation, not exactly.

Q. What did they say with reference to filing it?

A. Well, I don't remember that.

Q. Well did they agree not to file it right away?

A. Well, there was an understanding.

Q. To that effect?

A. Yes.

Q. Do you know what made them file it on September 9th?

A. No.

The cause was duly brought on for hearing before the court on 25th day of February, 1910, and was argued by counsel for the pective parties, and briefs were submitted by counsel for the re- ctive parties, and the case was duly submitted to the court for de- on.

On May 11th, 1911, the District Judge filed the following opinion:

*Opinion on Pleadings and Proofs.*

(Filed May 11th, 1911.)

In the District Court of the United States for the Eastern District of Michigan, Southern Division. In Equity.

DETROIT TRUST COMPANY, Trustee in Bankruptcy, Complainant,
vs.
PONTIAC SAVINGS BANK et al., Defendants.

On Pleadings and Proofs.

Bernard B. Selling, for Trustee.
Elmer R. Webster, for Defendants.

SWAN, *J.*:

Under the facts set forth in the bill and answer, which are not in conflict, the issue presented is one of law, and is concluded by the Statute of Michigan, Sec. 9523, 3 C. L. of Mich., p. 2912. This statute makes such unfiled mortgage "absolutely void against the creditors of the mortgagors and as against subsequent purchasers and mortgagees in good faith."

69 This has been construed in several cases by the Supreme Court of Michigan:

Fearey vs. Cumings, 41 Mich., 376.
Putnam vs. Reynolds, 44 Mich., 114.
Waite vs. Matthews, 50 Mich., 392.
Root vs. Hall, 62 Mich., 420.
Cutler vs. Steel, 85 Mich., 627.
Dempsey vs. Pforzheimer, 86 Mich., 652.

and later cases.

In Cutler vs. Ruston, 158 U. S. 423, 428, the court cites and follows several of the above cited Michigan decisions, saying: "Of course, the construction put upon the statute by the courts of the state, is to control the Federal Courts in a case like this." See also Security Warehousing Co. vs. Hand, 205 U. S. 425 et seq. In Kennedy vs. Dawson, 96 Mich., 79, 81, the assignee under a general assignment was held to be "the representative of all the creditors including those whose rights were injuriously affected by withholding the mortgage from the record." Under the Statute of Michigan, Sec. 6193 (Howell's Statutes), 3 C. L. Mich., of 1897, "the mortgage was void as against any claims which the plaintiffs had for goods sold between the time the mortgage was given and the time of filing."

Lord vs. West, 96 Mich., 418.
First National Bank vs. Guterman, 94 Mich., 125.
Baker vs. Parkhurst, 119 Mich., 542, 545.

That the state statute is the rule of decision is exemplified in the ses of

In re Ducker, 134 F. R., 43-50 (5th C. C. A.).
In re Martin, 23 N. B. R., 151 (8th C. C. A.).
In re First National Bank, 135 F. R., 62.
Humphrey vs. Tatman, 198 U. S. 91.
Etheridge vs. Sperry, 139 U. S., 266.

It is not therefore necessary under the Michigan Statute that editors who without notice of the mortgage have sold goods or ex-nded credit while the chattel mortgage to the Pontiac Savings nk was not of record should have obtained a lien upon the prop-y as a condition precedent to redress.

For these reasons the complainant is entitled to a decree for the benefit of the creditors named in the bill who, without notice of the mortgage, had sold goods to the bankrupts while e mortgage was not of record.

Decree will be entered accordingly.

(Signed) HENRY H. SWAN,
*District Judge.*

Dated May 11th, 1911.

On May 27th, 1911, the following decree was made and entered:

*Final Decree.*

(Filed May 27th, 1911.)

a Session of the District Court of the United States for the Eastern District of Michigan, Continued and Held at the Court House in he City of Detroit, in said District, upon the 27th Day of May, A. D. 1911.

Present: The Hon. Henry H. Swan, District Judge.

E DETROIT TRUST COMPANY, a Michigan Corporation, Trustee of the Estate of Charles Coates, Bankrupt, Complainant,

vs.

ARLES COATES and THE PONTIAC SAVINGS BANK, a Michigan Banking Corporation, Located at Pontiac, Michigan, Defend-nts.

This cause came on to be heard at this term, upon the Bill of Com-int, the answers and replications thereto, and testimony having n adduced by deposition and before Harlow P. Davock as special ster, to whom the case was referred for the taking of proofs, and said testimony having been duly considered, together with the ort of the special master, and the cause having been argued by nsel; thereupon, upon consideration thereof,

t is ordered, adjudged and decreed as follows:

. That the Pontiac Savings Bank, one of the above named de-

fendants, is indebted to the trustee in bankruptcy of Charles Coates, the complainant in this cause, in the following sums and amounts, representing goods sold and delivered and for which credit was extended to the said Charles Coates between the time of the
71–86 giving of and the time of the filing of the chattel mortgage set forth in the Bill of Complaint, which credit was extended in ignorance of the existence of said mortgage:

| | |
|---|---|
| The Estate of P. D. Beckwith, Dowagiac, Mich..... | $398.00 |
| Co-Operative Foundry Company, Rochester, N. Y..... | 307.20 |
| Cleveland Co-Operative Stove Co., Cleveland, O..... | 527.30 |
| Merchant & Co., Philadelphia ..... | 141.58 |
| T. J. Green, Detroit ..... | 44.30 |
| A total of ..... | $1,418.38 |

together with interest from the date of the filing of the Bill of Complaint.

2. That the Bill of Complaint is properly filed by the Detroit Trust Company, trustee in bankruptcy of Charles Coates and that the Court hath jurisdiction of this cause.

3. That the said mortgage was void as to all creditors who extended credit in ignorance of its existence during the period from the time of the execution of the mortgage until the filing of the same.

4. That the said mortgage is void as to the claims of the Estate of P. D. Beckwith, the Co-Operative Foundry Company, the Cleveland Co-Operative Stove Company, Merchant & Company and T. J. Green in the sums hereinbefore set forth, and

5. It is further ordered and decreed that the said Pontiac Savings Bank, one of the defendants, pay unto the complainant the said sum of $1,418.38 with legal interest to date at the rate of 5% from the date of the filing of the Bill of Complaint, amounting to $545.68, a total of $1,964.06, together with the costs hereafter to be taxed, and that in case of failure to pay the said sum of money with interest from the date of this decree and costs, the complainant shall have the right and power to cause to be issued a writ of execution for the collection thereof.

HENRY H. SWAN,
*District Judge.*

Countersigned.
CARRIE DAVISON, *Clerk.*

* * * * * * *

87 And afterwards towit on May 7, 1912, a decree was entered in said cause in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

#2211.

THE PONTIAC SAVINGS BANK
vs.
THE DETROIT TRUST CO.

Appeal from the District Court of the United States for the Eastern District of Michigan.

*Decree.*

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Michigan, and was argued by counsel.

On Consideration Whereof, It is now here ordered, adjudged and decreed by this Court that the decree of the said District Court, in this cause be and the same is hereby reversed with costs and the cause is remanded to the said District Court with directions
88 to enter a decree dismissing the bill of complaint.

And on the same day, towit on May 7, 1912, an opinion was filed in said cause which reads and is as follows:

*Opinion.*

89 Filed May 7, 1912. Frank O. Loveland, Clerk.

United States Circuit Court of Appeals, Sixth Circuit.

No. 2211.

DETROIT TRUST COMPANY, Trustee of the Estate of Charles Coates, Bankrupt, Complainant and Appellee,
vs.
PONTIAC SAVINGS BANK (Impleaded with Charles Coates), Defendant and Appellant.

Appeal from the District Court of the United States for the Eastern District of Michigan.

Submitted April 10, 1912. Decided May 7, 1912.

Before Warrington, Knappen, and Denison, Circuit Judges.

KNAPPEN, *Circuit Judge:*

On May 19, 1902, Coates, the present bankrupt, gave appellant a mortgage upon his stock in trade, fixtures, etc., to secure a then existing debt. The mortgage was not filed until September 9, 1902.

It does not appear that the failure to so file was fraudulent in fact. On January 10, 1903, there was paid to the bank, in satisfaction of the mortgage, from moneys paid on the purchase of the stock and fixtures from Coates, the sum of $2,120.50. Proceedings in involuntary bankruptcy were begun against Coates on February 16, 1903, and he was adjudicated bankrupt on March 6th following.

The trustee then brought this suit against the bank, for the
90 recovery of the amounts of the claims of creditors who became such between the giving and filing of the mortgage. Complainant's brief asks this recovery for the benefit of creditors generally. See In re Martin, 193 Fed., 841. Upon final hearing on pleadings and proofs decree was entered for complainant, from which this appeal is taken.

A preliminary question is presented as to the jurisdiction of the court below over the present suit. Section 23*b* of the Bankruptcy Act, relating to jurisdiction over controversies between the trustee and adverse claimants, provides that such suits "shall only be brought or prosecuted in the court where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant, * * *." The bank appeared generally and answered to the merits of the bill, without questioning the jurisdiction of the court. After it had taken some testimony under the issues joined it challenged the jurisdiction for lack of defendant's consent thereto, by way of objection made to further testimony. Jurisdiction was not given unless by virtue of the facts stated. The district court overruled the objection. Defendant contends that the statute contemplates a consent previous to the filing of the bill, and that, in any event, consent is not given by mere failure to deny jurisdiction. That the bill in this case could have been maintained only by defendant's consent is settled by Bardes vs. Hawarden Bank, 178 U. S., 524. In that case the question of jurisdiction was raised by demurrer to the bill. It was not decided that consent must be given before suit begun, nor was it determined what would amount to consent. In support of the contention that consent was not given by appearance and pleading to the merits, reliance is had upon Louisville Trust Co. vs. Comingor, 184 U. S., 18, and kindred cases. In the Comingor case an attempt was made by summary proceedings to subject an adverse claimant of property to the jurisdiction of the bankruptcy court. The case involved specially the right to summary method of procedure as distinguished from the usual forms of judicial procedure. The
91 case before us is the familiar form of plenary suit, according to the ordinary and regular mode of judicial proceeding. The court had jurisdiction of the subject-matter. The consent required of defendant was only to the particular tribunal. No question of method of procedure was involved. We think the distinction between the two classes of jurisdictional questions was recognized by this court in Sinsheimer vs. Simonson, 107 Fed., 898, 906. Where a suit is cognizable in the federal courts, objection to the jurisdiction of the court of the district of suit is waived by appearance

and pleading to the merits. Central Trust Co. vs. McGeorge, 151 U. S., 129; Interior Construction, Etc., Co. vs. Gibney, 160 U. S., 217, 220; Western Loan & Savings Co. vs. Mining Co., 210 U. S., 366; Erie R. R. Co. vs. Kennedy (C. C. A. 6), 191 Fed., 332, 334, and cases there cited. In Grand Rapids, Newaygo & Lake Shore Ry. Co. vs. Gray, 38 Mich., 461, it was held that by pleading to the merits the defendant subjected himself to the jurisdiction of a court of special and limited jurisdiction, to which he otherwise would not have been subject. We think the analogy of these cases is decisive of the question before us. It has been held by several of the district courts that appearance and pleading to the merits in plenary suits by a trustee, without objection to jurisdiction, is a consent thereto. In re Connelly, 100 Fed., 620, 626; In re Steuer, 104 Fed., 976, 977; Ryttenberg vs. Schefer, 131 Fed., 313, 317; Sheppard vs. Lincoln, 184 Fed., 182, 183. We think this the correct view, and that the court below rightly overruled the objection to its jurisdiction.

The bill attacks the payment to the bank, first, as an unlawful preference under the bankruptcy act; and, second, as invalid under Section 9523, Comp. Laws Mich., 1897, as amended by Act 332 of the Public Acts of 1907, which provides that every chattel mortgage "not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers or mortgagees in good faith," unless the mortgage or a copy thereof be filed as directed in the statute.

92 In this court the charge of unlawful preference is abandoned, and relief is asked solely by reason of the invalidity of the mortgage under the Michigan statute. It is settled by the decisions of the Supreme Court of Michigan that the words "creditors of the mortgagor" mean subsequent creditors in good faith and without notice of the mortgage, and that the statutory invalidity of an unfiled chattel mortgage extends to all creditors who became such after the giving and before the filing of the mortgage. Recovery can be had here on but one or two theories, first, that the bankruptcy act creates a lien in favor of the creditors under which the rights given by the Michigan statute can be enforced; or, second, that the Michigan statute creates such a lien. The bankruptcy act does not operate as an attachment of the bankrupt's property, nor itself create a lien in favor of creditors of the class before us. York Mfg. Co. vs. Cassell, 201 U. S., 344; Crucible Steel Co. vs. Holt (C. C. A. 6), 174 Fed., 127; affirmed by the Supreme Court April 1, 1912. The controlling question, therefore, is whether the rights given by the Michigan statute to the class of creditors named amount to an actually established lien, or, on the other hand, to a mere right to create a lien. The interpretation of this statute as adopted by the Supreme Court of Michigan must be accepted by the federal courts. Thompson vs. Fairbanks, 196 U. S., 516; York Mfg. Co. vs. Cassell, 201 U. S., 344; In re Doran (C. C. A. 6), 154 Fed. 467.

The learned district judge was of opinion that it was not necessary, under the Michigan statute, that the creditors in question should

have obtained a lien upon the mortgaged property as a condition precedent to relief as against the mortgagee. Since the decision below, the case of In re Huxoll, 193 Fed., 851, has been decided by this court. We there carefully reviewed and considered the Michigan decisions, and reached the conclusion that the Michigan statute does not of itself create a lien upon the mortgaged property prior to the lien of the mortgage; but gives merely a right to a lien, requiring a proceeding of some kind for its fastening. We
93 there held that the right to lien was lost if such proceeding was not taken before bankruptcy.

It is urged that an assignee for the benefit of creditors is held by the Supreme Court of Michigan to have a right to avoid an unrecorded chattel mortgage so far as affects the rights of creditors of the class here concerned, and it is insisted that the rights of a trustee in bankruptcy are no less than those of a statutory assignee. But as we pointed out in the Huxoll case, the Michigan decisions mean no more than that the assignee is by the assignment given a lien upon the property which did not before exist. The mere fact that a lien is created under statutory assignment for the benefit of creditors does not give a lien under the bankruptcy act. This conclusion directly follows from the decision in York Mfg. Co. vs. Cassell, supra; for under the Ohio decisions the superior rights of creditors under an invalid chattel mortgage could be enforced by an assignee in insolvency, by the personal representatives of a deceased insolvent, as well as by the receiver of an insolvent corporation. Cincinnati Equipment Co. vs. Degnan (C. C. A. 6), 184 Fed. 834, 842. In the Degnan case we declined to yield to the contention that because a trustee in bankruptcy could not enforce the superior rights of creditors under the Ohio statute, relief could not be had by virtue of a receivership under a creditors' bill. And in the Huxoll case we said that "the fact that an assignee for the benefit of creditors is by the assignment given a lien does not of itself give such a lien to the trustee in bankruptcy." There is nothing in the decision of this court in Foerstner vs. Citizens' Savings & Trust Co., 186 Fed., 1, opposed to the proposition above stated. In the Foerstner case relief was denied to the claimant under an unfiled real estate mortgage upon the ground that the Ohio statute, as construed by the highest court of that state, gave the mortgagee merely a contract for a lien, as distinguished from an actual lien. Heinemann vs. Schloss, 83 Mich. 153, 157, is cited as authority for the proposition that a bill of complaint gives the same equitable lien that a proceed-
in garnishment brought by the creditors represented by
94 & 95 the trustee would have given. While we find nothing in that case supporting the proposition stated as applied to the situation before us, the question is immaterial here, because no bill in equity had been filed previous to the bankruptcy, and it is clear, under the authorities we have cited, that the filing of such bill after bankruptcy cannot have the effect claimed. The cases of Metcalf vs. Barker, 187 U. S., 165, and In re Ransford, decided by this court March 13, 1912, contain nothing opposed to the views we have ex-

pressed, as to the necessity of lien before bankruptcy in suits of the character of that before us.

There is no merit in the suggestion that the Huxoll case does not control the case before us from the fact that the question in that case was merely one of priority between creditors. That case turned squarely upon the decisive propositions that the existence of a lien prior to bankruptcy was necessary for enforcement in bankruptcy of the prior rights of creditors of the class before us, and that no such lien is created by the Michigan statute. The fact that in this case the mortgaged property had been sold, and that attempt is made to reach not the property itself, but the personal responsibility of the mortgagee, gives the trustee no greater rights. The decision in the Huxoll case must be adhered to, and is decisive of the present controversy.

The decree appealed from must be reversed with costs, and the case remanded to the district court with directions to enter decree dismissing the bill of complaint.

* * * * * * *

96 And on the same day, towit May 1st, 1913, assignments of error were filed in said cause in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

97 THE DETROIT TRUST COMPANY, Trustee of the Estate of CHARLES COATS, Defendants and Appellees.

vs.

THE PONTIAC SAVINGS BANK, a Michigan Banking Corporation, and CHARLES COATES, Defendants and Appellees.

*Assignments of Error.*

The appellant in the above entitled cause, in connection with its Petition for Appeal herein, presents and files therewith, its assignments of error as to which matters and things it says the decree entered therein on the 7th day of May, 1912, is erroneous, towit:

First. That the Court erred in saying in its opinion that it does not appear that the failure to file the chattel mortgage in controversy was fraudulent in fact.

Second. That the Court erred in holding in its opinion that:

"Recovery can be had here on but one of two theories, first, that the Bankruptcy Act creates a lien in favor of the creditors under which the rights given by the Michigan statute can be enforced; or second, that the Michigan statute creates such a lien."

Third. That the Court erred in holding in its opinion that:

98 "The Bankruptcy Act does not operate as an attachment of the bankrupt's property, nor itself create a lien in favor of creditors of the class before us."

Fourth. That the Court erred in holding in its opinion, that:

"The controlling question, therefore, is whether the rights given

by the Michigan statute to the class of creditors named amount to an actually established lien, or, on the other hand, to a mere right to create a lien."

Fifth. That the Court erred in holding that under the Michigan statute the creditors who extended credit while the mortgage was off the records, should have obtained a lien upon the mortgaged property as a condition precedent to relief in a proceeding instituted by the trustee in bankruptcy.

Sixth. That the Court erred in deciding that the Michigan statute does not of itself creat a lien upon mortgaged property prior to the lien of the mortgage, in favor of creditors who extended credit in ignorance of its existence while it was unfiled, but gives merely a right to a lien, requiring a proceeding of some kind for its fastening, and that the right to a lien is lost if such proceeding be not taken before bankruptcy.

99 Seventh. That the Court erred in holding that a trustee in bankruptcy has less right to assert the invalidity of a mortgage as against creditors who extended credit in ignorance of the existence of the mortgage and prior to its filing, than an assignee for the benefit of creditors under the Michigan statutes.

Eighth. That the Court erred in holding that the Michigan decisions mean no more than that an assignee is by an assignment given a lien upon property which did not before exist.

Ninth. That the Court erred in holding that the mere fact that a lien is created under statutory assignment for the benefit of creditors dies not give a lien under the Bankruptcy Act.

Tenth. That the Court erred in holding that the decision in the case of York Manufacturing Company vs. Cassell controls the case at bar.

Eleventh. That the Court erred in refusing to hold that after an adjudication in bankruptcy, a trustee properly appointed may file a bill to reach the proceeds of property covered by a mortgage absolutely void as to creditors who might have brought such suit

100 after obtaining judgment and having execution returned unsatisfied had not bankruptcy intervened.

Twelfth. That the Court erred in holding that a bill in equity to reach the proceeds of a void chattel mortgage must be filed prior to adjudication in bankruptcy and cannot be filed thereafter by the trustee in bankruptcy in order to reach the proceeds of such void mortgage.

Thirteenth. That the Court erred in holding that it was necessary for creditors to have an absolute lien upon the property before bankruptcy in order for the trustee to maintain this proceeding.

Fourteenth. That the Court erred in holding that there was no merit in the suggestion that the Huxoll case did not control the case at bar for the reason that the question in that case was merely one of priority between creditors.

Fifteenth. That the Court erred in holding that the fact that in the case at bar the mortgaged property had been sold and that an attempt is made to reach not the property itself, but the personal

responsibility of the mortgagee, gives the trustee no greater rights.

101–106 Sixteenth. That the Court erred in holding that the decision in the Huxoll case is decisive of the case at bar.

Seventeenth. That the Court erred in holding that the appellant was entitled to no relief.

Eighteenth. That the Court erred in reversing the decree of the Court below.

Nineteenth. That the Court erred in remanding the proceeding and ordering the dismissal of appellant's Bill.

Wherefore the appellant prays that said decree may be reversed and that the appellant may have an adjudication and decree in its favor as herein specified.

Endorsed: Lodged with me April 30, 1913. Loyal E. Knappen, U. S. Circuit Judge.

BERNARD B. SELLING,
*Solicitor for Appellant.*

* * * * * * *

107 UNITED STATES OF AMERICA:

In the Supreme Court of the United States.

DETROIT TRUST COMPANY, Trustee in Bankruptcy of Charles Coates, Bankrupt, Complainant and Appellant,

vs.

PONTIAC SAVINGS BANK, a Michigan Banking Corporation, and CHARLES COATES, Defendants and Appellees.

UNITED STATES OF AMERICA,
*Eastern District of Michigan, ss:*

Clara M. Huiss, being duly sworn, deposes and says that she is a clerk in the office of Bernard B. Selling, the Solicitor for Appellant in the above entitled cause; that upon the 8th day of July, A. D. 1913, she served upon Messrs. Geer, Williams, Martin & Butler, solicitors for the Pontiac Savings Bank, Defendant and Appellee, a true copy of the within statement of errors on which Appellant intends to reply and of the parts of the Record necessary for consideration thereof, by placing said statement in an envelope addressed to the said Geer, Williams, Martin & Butler, 18 Buhl Block, Detroit, Michigan, placing sufficient postage thereon, and leaving said envelope with such enclosure with the Clerk in Charge of the Registry Division of the U. S. post office at Detroit, Michigan, for delivery to the said Geer, Williams, Martin & Butler.

Deponent further says that upon the same day she served upon Elmer R. Webster, solicitor for Charles Coates, Defendant and Appellee, a true copy of the within statement of errors on which Appellant intends to rely and of the parts of the Record necessary for the consideration thereof, by placing said statement in an envelope

addressed to the said Elmer R. Webster, Pontiac, Michigan,
108 placing sufficient postage thereon, and leaving said envelope with such enclosure with the Clerk in charge of the Registry Division of the U. S. post office at Detroit, Michigan, for delivery to the said Elmer R. Webster at Pontiac, Michigan.

Further deponent says not.

CLARA M. HUISS.

Subscribed and sworn to before me this 8th day of July, A. D. 1913.

JUDSON M. PERRY,
*Notary Public, Wayne County, Michigan.*

Commission expires Jan. 16" 1915.

109 In the Supreme Court of the United States.

DETROIT TRUST COMPANY, Trustee in Bankruptcy of Charles Coates, Bankrupt, Complainant and Appellant,

vs.

PONTIAC SAVINGS BANK, a Michigan Banking Corporation, and CHARLES COATES, Defendants and Appellees.

To Messrs. Geer, Williams, Martin & Butler, and Elmer R. Webster, Solicitors for Appellees:

Attached hereto you will find statement under subdivision 9 of Rule 10, with reference to the errors upon which we rely and the parts of the record which we think ought to be printed.

Yours, etc.,

BERNARD B. SELLING,
*Solicitor for Appellant.*

Dated; Detroit, Michigan, July 8, A. D. 1913.

110 UNITED STATES OF AMERICA:

In the Supreme Court of the United States.

DETROIT TRUST COMPANY, Trustee in Bankruptcy of the Estate of Charles Coates, Bankrupt, Appellant,

vs.

THE PONTIAC SAVINGS BANK, a Michigan Banking Corporation, and CHARLES COATES, Appellees.

Under Rule 10, Subdivision 9, the Appellant does file with the Clerk, a statement of the errors on which it intends to rely and of the parts of the record which it deems necessary for the consideration thereof. The errors upon which appellant intends to rely are Assignments of Error 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18 and 19, being all of the errors assigned.

The parts of the record which appellant thinks necessary for the consideration of the foregoing Assignments of Error are as follows;

(1) Bill of Complaint with the exhibit thereto attached.

(2) Answer of the defendant the Pontiac Savings Bank; and statement that replication was thereto duly filed; also the statement that an answer was filed in behalf of defendant Coates to which replication was duly filed.

(3) The depositions of Charles F. Mertz, Edward S. Brayer, Dennis F. McCarthy, William W. Decker, O. G. Beach, Albert B. Raiguel, William H. Walton and C. Ellwood Hana and the exhibits thereto annexed, as the same appear in the printed record in the Circuit Court of Appeals for the Sixth Circuit, on pages 22 to 40 inclusive.

111 (4) Also Exhibit 9, Stipulation between counsel.

(5) Opinion of District Judge Swan on Questions Certified by Referee, said opinion being dated March 12, 1906, and appearing in the printed record in the Circuit Court of Appeals at page 45.

(6) Also proceedings had before Special Examiner on September 27/1907, together with balance of testimony taken, opinion and final decree in the District Court, constituting pages 46 to 71 of the printed record in the Circuit Court of Appeals for the Sixth Circuit.

(7) Opinion of the Circuit Court of Appeals, and Appellant's "Assignment of Errors."

BERNARD B. SELLING,
*Solicitor for Appellant.*

112 [Endorsed:] 552–13. 23691. Supreme Court of the United States. Detroit Trust Company, Trustee in bankruptcy of Charles Coates, bankrupt Complainant and Appellant vs. Pontiac Savings Bank, et al. Defendants and Appellees. Statement of Errors on which Appellant intends to rely, and parts of Record necessary for consideration thereof—and Proof of Service. Bernard B. Selling, Attorney-at-Law, 503-4-5-6-7-8 Hammond Bldg., Detroit, Mich., Solicitor for Appellant.

113 [Endorsed:] File No. 23,691. Supreme Court U. S. October term, 1913. Term No. 552. Detroit Trust Company, Trustee etc., Appellant, vs. Pontiac Savings Bank et al. Statement of errors relied upon, and designation by appellant of parts of record to be printed, and proof of service of same. Filed July 10, 1913.

Endorsed on cover: File No. 23,691. U. S. Circuit Court of Appeals, 6th Circuit. Term No. 173. Detroit Trust Company, trustee in bankruptcy of the estate of Charles Coates, bankrupt, appellant, vs. The Pontiac Savings Bank and Charles Coates. Filed May 14th, 1913. File No. 23,691.

# Supreme Court of the United States

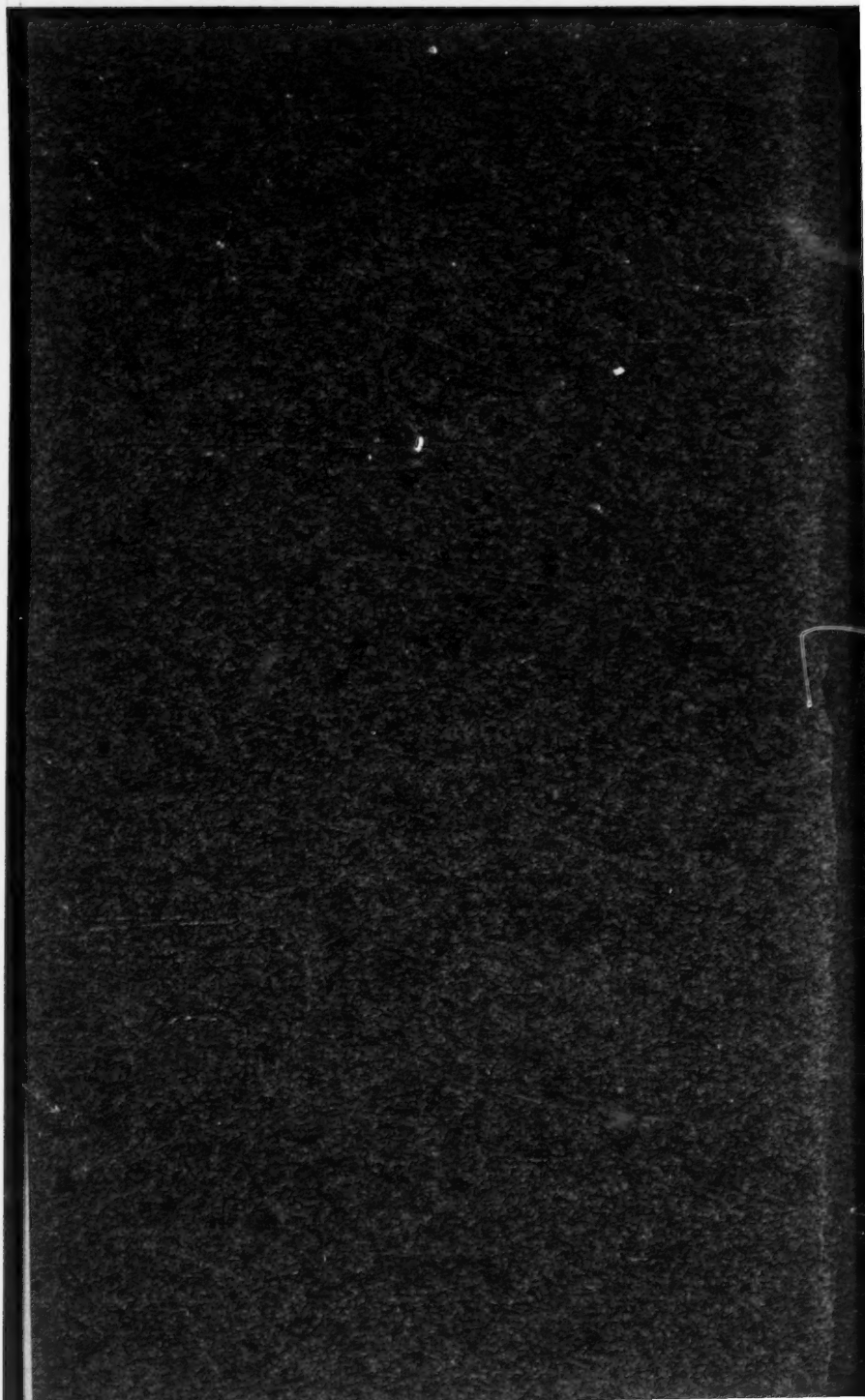
October Term, 1914.

No. 908.

## BRIEF FOR COMPLAINANT.

Solicitors for Complainant and Appellant.

Of Counsel.



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# upreme Court of the United States

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| TROIT TRUST COMPANY, Trustee in Bankruptcy of the Estate of CHARLES COATES, Bankrupt, *Complainant and Appellant,* vs. NTIAC SAVINGS BANK and HARLES COATES, *Defendants and Appellees.* | October Term, 1914. No. 173. |

## BRIEF FOR COMPLAINANT.

The Complainant is the duly elected Trustee in Bankruptcy Charles Coates, a former hardware dealer in Pontiac, ichigan. The Defendant Bank was the holder of a chattel ortgage given on the stock in trade of Charles Coates on ay 19, 1902 (R. 53), which mortgage was withheld from the cord until September 9, 1902 (R. 53), upon which latter te it was filed with the City Clerk of Pontiac. During the riod the mortgage was off the files there was delivered to harles Coates by creditors who proved claims, merchandise onsisting mostly of stoves) to the following amounts, which ere never paid for (R. 52):

| | |
|---|---|
| The Estate of P. D. Beckwith, Dowagiac, Mich. | $ 398.00 |
| Co-Operative Foundry Company, Rochester, N. Y. | 307.20 |
| Cleveland Co-Operative Stove Co., Cleveland, O. | 527.30 |
| Merchant & Co., Philadelphia | 141.58 |
| T. J. Green, Detroit | 44.30 |
| A total of | $1,418.38 (R. 52). |

None of the creditors above mentioned had knowledge or

even notice of the existence of the unfiled mortgage (R. 29, 27, 23, 42). The mortgage had been given to secure an antecedent indebtedness owing to the Pontiac Savings Bank (R. 9). There was due on the mortgage on January 10, 1903, the sum of $2,120.50 (R. 10). On that date Coates sold out his stock to Tidball & Parmeter for $5,187.36 (R. 33). Mr. Tidball having learned of the existence of the mortgage on the afternoon of that day went across the street to the bank to learn the amount of it (R. 34); and then after the inventory was completed on the evening of January 10, 1903, he and Coates went over to the Pontiac Savings Bank and, because of the existence of the mortgage and Tidball's desire to have it discharged, and *for no other reason* (R. 34), he paid to the Bank the amount which the Bank claimed to be due on the mortgage, and received a receipt reading as follows:

> "Pontiac, Mich., Jan. 10th, 1903.
>
> Received of Charles Coates, through Tidball & Parmeter, two thousand one hundred twenty dollars and fifty cents, in full settlement of the claim of this bank against stock of hardware owned by C. Coates.
>
> $2,120.50. PONTIAC SAVINGS BANK,
> By D. H. Powers, President."

and also received the promise of the officer of the Bank to discharge the mortgage the following Monday morning (R. 35). The entire purchase price was turned over to Coates in the Bank that night and Tidball saw that the amount of the mortgage was paid and *the reason that he did so was to get the lien off the property and for no other reason* (R. 36).

The answer of the Defendant Bank admits that the Bank never had possession nor attempted to obtain possession of the property described in the chattel mortgage (R. 10), and that Tidball & Parmeter went to the Bank on January 10, 1903, and that Tidball & Parmeter then and there paid to Defendant Bank $2,120.50 in full satisfaction of said chattel mortgage (R. 9).

Proceedings in involuntary bankruptcy were taken against Coates on February 16, 1903 (R. 54) and he was adjudicated a bankrupt on March 6th following. The bill of complaint was filed upon the equity side of the District Court of the United States for the Eastern District of Michigan on September 14, 1903 (R. 1). Defendants answered upon the merits, proofs were taken from time to time (Before the Referee as Special Master), and upon the conclusion of the proofs the District Judge held the Pontiac Savings Bank

liable to the Trustee in Bankruptcy for the amount of the claims of creditors who had extended credit while the mortgage was in existence and not on file, and a decree was entered in favor of the Trustee for such amount, $1,418.38, with interest thereon to the date of the decree (R. 51-52). The Defendant Pontiac Savings Bank appealed to the Circuit Court of Appeals for the Sixth Circuit and raised two points:

(1) That the lower court had no jurisdiction because the proceeding was brought to attack a transfer made more than four months prior to the filing of the petition in bankruptcy.

(2) That because neither the Trustee nor any of the creditors who had sold goods in the period between the giving and the filing of the mortgage, had obtained liens upon the property prior to the filing of the petition, the bill must be dismissed.

The Circuit Court of Appeals held that the objection to the jurisdiction was not well taken and that the defendant having answered upon the merits without raising any question of jurisdiction, the Bank waived any objection to the jurisdiction (R. 55).

The Circuit Court of Appeals, however, upon the other question held against Complainant and held that neither the Trustee nor the creditors had acquired any lien prior to the filing of the petition in bankruptcy, and therefore, Complainant had no rights against the Bank.

It is from this holding that Complainant appeals. Defendant Bank does not appeal.

## ERRORS RELIED UPON.

Appellant claims error by the Circuit Court of Appeals upon the following propositions:

(1) In holding "Recovery cannot be had here on but one of two theories, first, that the bankruptcy act creates a lien in favor of the creditors under which the rights given by the Michigan statute can be enforced; or, second, that the Michigan statute creates such a lien" (R. 55).

(2) In holding that the controlling question, is whether the rights given by the Michigan statute to

the class of creditors named amount to an actually established lien, or, on the other hand, to a mere right to create a lien (R. 55).

(3) In holding that the Michigan statute does not of itself create a lien upon the mortgaged property prior to the lien of the mortgage, but gives merely a right to a lien, requiring a proceeding of some kind for its fastening, *and that a right to a lien was lost if such proceeding is not taken before bankruptcy* (R. 56).

(4) In holding that the rights of a trustee in bankruptcy are less than those of a statutory assignee for the benefit of creditors (R. 56).

(5) In holding that a bill in equity filed by a trustee in bankruptcy is not such a proceeding as will permit the Trustee to assert as to the chattel mortgage the invalidity created by the Michigan statute as to creditors extending credit while the mortgage was unfiled (R. 56).

(6) In holding that Complainant had no standing and that the bill of complaint must be dismissed (R. 57).

## STATUTES INVOLVED.

The Michigan statute involved directly, is Section 9523 of the Michigan Compiled Laws of 1897, reading as follows:

### Recording Law Relative to Chattel Mortgages.

"Section 10. Every mortgage, or conveyance intended to operate as a mortgage of goods and chattels, which shall hereafter be made, *which shall not be accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers or mortgagees in good faith, unless the mortgage, or a true copy thereof, shall be filed in the office of the* township clerk of the township, or *city clerk of the city,* or city recorder of cities, having no officer known as city clerk, *where the mortgagor resides,* except when the mortgagor is a non-resident of the state, when the mortgage, or a true copy thereof, shall be filed in the office of the township clerk, or clerk of the city, or city recorder of cities having no officer known as city clerk, where the property is."

## GARNISHMENT STATUTES.

"Sec. 2. From the time of the service of such writ, the garnishee shall be deemed liable to the plaintiff to the amount of property, money, goods, chattels and effects, in his control belonging to the principal defendant, or of any debts due or to become due from such garnishee to the principal defendant, or of any judgment or decree in favor of the latter against the former, and for all property, personal and real, against the former, and for all property, personal and real, money, goods, chattels, evidences of debt or effects of the principal defendant, which such garnishee defendant holds by a conveyance, transfer or title that is void as to creditors of the principal defendant; and such garnishee shall also be liable on any contingent right or claim against him in favor of the principal defendant." (How. Stat. 1882, Sec. 8059.)

"Sec. 35. If any person garnished have in his possession any of the property aforesaid of the principal defendant, which he holds by a conveyance or title that is void as to the creditors of the defendant, he may be adjudged liable as garnishee on amount (account) of such property, although the principal defendant could not have maintained an action therefor against him." (How. Stat. 1882, Sec. 8091.)

By Act No. 244, Laws of 1889 (3 Howell's Statutes, pp. 753, 3757), the above Sections 8059 and 9091 were amended to read as follows:

"Sec. 8059. From the time of the service of such writ, the garnishee shall be liable to the plaintiff to the amount of property, money, goods, chattels and effects under his control, belonging to the principal defendant, or of any debts due, or to become due, from such garnishee to the principal defendant, or of any judgment or decree in favor of the latter against the former, and for all property, personal and real, money, goods, evidences of debt, or effects of the principal defendant which such garnishee defendant holds by conveyance, transfer, or title that is void as to creditors of the principal defendant, and for the value of all property, personal and real, money, goods, chattels, evidences of debt or effects of the principal

defendant which such garnishee defendant *received or held by a conveyance, transfer, or title that was void as to creditors of the principal defendant; and such garnishee defendant shall also be liable on any contingent right or claim against him in favor of the principal defendant." (3 Mich. C. L. 1897,

"Sec. 8091. If any person garnisheed shall have in his possession any of the property aforesaid of the principal defendant which he holds by a conveyance or title that is void as to creditors of the defendant, *or if any person garnished shall have received and disposed of any of the property aforesaid of the principal defendant which is held by a conveyance or title that is void as to creditors of the defendant, he may be adjudged liable, as garnishee, on account of such property, and for the value thereof, although the principal defendant could not have maintained an action therefor against him." (3 Mich. C. L. 1897, Quoted in full in Heineman & Schloss, 83 Mich., 153.)

## WHAT PROPERTY PASSES TO AN ASSIGNEE FOR CREDITORS.

"Sec. 3. Every such assignment shall confer upon such assignee the right to recover all property, or right or equities in property which might be reached, or recovered by any of the creditors of such assignor, etc." (3 Mich. C. L. 1897, Sec. 9541.)

Section 70-a of the Bankruptcy Law provides as follows:

"The trustee of the estate of a bankrupt, upon his appointment and qualification, and his successor or successors, if he shall have one or more, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt, to all * * * (4) property transferred by him in fraud of creditors; (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him, etc."

*The part italicized was added by the amendment of 1889.

Section 70-e of the Bankruptcy Law provides as follows:

> "The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a bona fide holder for value prior to the date of the adjudication. Such property may be recovered or its value collected from whoever may have received it, except a bona fide holder for value * * *."

Section 67-a of the Bankruptcy Law provides as follows:

> "Claims which for want of record or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate."

Section 67-b of the Bankruptcy Law provides as follows:

> "Whenever a creditor is prevented from enforcing his rights as against a lien created, or attempted to be created, by his debtor, who afterwards becomes a bankrupt, the trustee of the estate of such bankrupt shall be subrogated to and may enforce such rights of such creditors for the benefit of the estate."

## USE OF EXPRESSION "SUBSEQUENT CREDITORS" IN THIS BRIEF.

For the sake of brevity we shall use the expression "subsequent creditors" as indicating creditors who extended credit between the date of the giving and the recording of the chattel mortgage and in ignorance of its existence, although we realize that such expression is not ordinarily entirely accurate. In this case, however, it is entirely accurate because all the creditors who extended credit after the giving of the mortgage, did so in ignorance of its existence and before it was recorded.

## ARGUMENT.

(1) Complainant asserts that the chattel mortgage given by Coates to the Pontiac Savings Bank was and *is absolutely void* against all creditors who extended credit while the mort-

gage was unfiled, and who had no knowledge of its existence (hereinafter referred to as subsequent creditors); (2) that such invalidity was and is absolute and depends neither upon the creditor fastening a lien upon the property or its proceeds before the Bank took possession of the property or its proceeds, nor upon the fastening of a lien on the property or its proceeds before the filing of the petition in bankruptcy; (3) that any necessity for having a lien upon the property or its proceeds is merely a matter of remedy and not of right. (4) That if any lien at all is required before the mortgage may be attacked in behalf of such subsequent creditors, such lien might be obtained as well after the amount of such mortgage was collected by the mortgagee as before; (5) that the filing of a creditors' bill creates such equitable lien if a lien be necessary.

The principles upon which this case must be decided were clearly laid down by this court in the case of Holt, Trustee in Bankruptcy, vs. Crucible Steel Co., 224 U. S., 262. In that case this Court held that if the decisions of the Supreme Court of Kentucky had held an unrecorded chattel mortgage was void as against subsequent creditors who extended credit while the mortgage was off the files and unrecorded, without it being necessary for such creditors to fasten a lien upon the property prior to bankruptcy, this Court would hold that such mortgage was void as against the Trustee in Bankruptcy.

We rely particularly upon two Michigan cases, Heineman vs. Schloss, 83 Mich., 153, and Baker vs. Parkhurst, 118 Mich., 542. A number of other decisions, however, will necessarily be cited to determine the scope of the interpretation by the Michigan Supreme Court of the statute relating to unfiled chattel mortgages upon the rights of creditors and others.

We take the position that the learned Judges of the Circuit Court of Appeals confused the rights of subsequent creditors who extend credit while the mortgage is off the files, with the rights of creditors whose claims accrue before the chattel mortgage is given but who fasten a lien upon the property before the mortgagee takes possession. We concede that a creditor whose claim antedated the unfiled chattel mortgage (and did nothing to his detriment in ignorance of the existence of the mortgage) must secure a lien upon the property before the recording of the mortgage and before the mortgagee takes possession; *otherwise it becomes valid as to him.* We insist, however, that the rule is different with reference to claims of creditors which arose subsequent to the giving

of the mortgage and prior to its recording; *that as to such claims the mortgage is void in toto; that there is no necessity of having a lien upon the property before the property or its proceeds come into the possession of the mortgagee; that the filing of a petition in bankruptcy does not cut off the right of such creditors through the trustee to reach the proceeds of the mortgage so held from the files.*

In Michigan a mortgage voidable as to all or certain creditors may be attacked in four different ways:

(1) By an attachment of the goods covered by the mortgage.

(2) By levy of execution upon such goods.

(3) By garnishment of the mortgagee in possession of the goods, or of a mortgagee (since the amendment of 1889) who has in the past had possession of the goods or their proceeds although he may have parted with possession thereafter.

(4) By equitable proceedings.

Almost all of the cases upon the subject have arisen in one or another of the above methods, although there are several cases in Michigan in which the property has come into the hands of an assignee for the benefit of creditors, in which cases the Supreme Court of Michigan has held that upon the marshalling of the assets, those creditors who extended credit while the mortgage was off the files were entitled to be first paid in full before the mortgagee receives anything under it; then should follow the creditors secured by the mortgage, and lastly, those creditors whose claims were in existence at the time the mortgage was given and who had themselves fastened no lien upon the property prior to the time the assignee came in possession of the same.

*Root vs. Harl*, 62 *Mich.*, 420.
*Brown vs. Brabb*, 67 *Mich.*, 17.
*Kennedy vs. Dawson*, 96 *Mich.*, 79.

We shall refer to these cases later.

It will be noted, however, in passing, that the assignee for the benefit of creditors, was permitted to assert the rights of the "subsequent" creditors but was not permitted to assert the rights of general creditors who had fastened no lien upon the property prior to the recording of the mortgage or the making of the assignment.

We take the position that if the statute which we have quoted (this brief, p. 6) gives an assignee for the benefit of creditors, under the Michigan statute, the power to assert for the benefit of "subsequent" creditors the rights which such creditors have against the mortgagee, while denying the assignee the power to assert that the assignment creates an equitable lien for the benefit of prior creditors who did not themselves fasten a lien upon the property prior to the recording of the instrument or the making of the assignment, then Sections 67 and 70 of the Bankruptcy Law, which gives a trustee even greater rights than the Michigan statute does an assignee, gives at least the same power to assert the invalidity of the mortgage as the Michigan assignment statute does, for the benefit of "subsequent" creditors. *There is no Michigan authority which, upon analysis, is contrary to this view.* It would seem intolerable that an assignment for the benefit of creditors (which is vacated ipso facto by an adjudication in bankruptcy) should give greater rights to "subsequent" creditors than the bankruptcy act itself does, or that an assignee for the benefit of creditors may successfully assert the invalidity of the mortgage as to such creditors, but the Trustee under the Bankruptcy Law may not do so.

Should it be held that a Trustee in Bankruptcy has not the same right or power to assert the invalidity of the mortgage in behalf of "subsequent" creditors as an assignee for the benefit of creditors would have, and that there must be a lien in existence before the Trustee in Bankruptcy may attack such mortgage, then we insist that the filing of a bill on the equity side of the court by a trustee in bankruptcy for and in behalf of such "subsequent" creditors creates an equitable lien sufficient to enforce the rights of such creditors, and that such bill filed by a trustee in bankruptcy has all the force and effect of a judgment creditors' bill, which under all decisions creates an equitable lien upon the property of the debtor disposed of by an instrument void as to creditors; that the necessity of creditors taking judgment and having the execution returned unsatisfied ceased by reason of all assets of the debtor which could be reached by execution having come into the custody of the law; that the law requires no such useless thing as the taking of worthless judgments, the issuing of executions thereon, and having such executions perfunctorily returned unsatisfied, as must necessarily happen in the case of a debtor adjudged bankrupt.

## MICHIGAN CASES.

We give below a synopsis of the Michigan cases in the der in which they were decided.

Fearey vs. Cummings, 41 Mich., 376. This proceeding was ought by Fearey, et al. (creditors) against Nellis (debtor) th process of garnishment against Cummings, et al. (mort-gees), who had taken a chattel mortgage and kept it off the s. The claim of the creditors had been incurred subse-ent to the giving of the mortgage and without knowledge of existence. They attacked the mortgage on two grounds: ) that the property had been sacrificed on an improper sale, d (2) that the mortgage was void as to subsequent creditors o extended credit without knowledge of its existence. The urt said (in finding for plaintiff):

> *"If the mortgage was made with intent to hinder, delay, or defraud creditors (Comp. L., Sec. 4713), or inasmuch as the possession was not altered, if it was not put on file prior to plaintiffs becoming creditors,* it was invalid as against them; the law being that those who become creditors whilst the mortgage is not filed are protected, and *not merely those who obtain judgments or levy attachments before the filing.* Still no one as creditor at large can question the mortgage. He can only do that by means of some process or proceeding against the property. Sec. 4706. Thompson vs. Van Vechten, 27 N. Y., 568. And garnishee process is such proceeding."

t is upon the foregoing language that the Circuit Court of peals in the instant case and in re Huxoll, 193 Fed., 851 hich the Court of Appeals held to control the case at bar), arently relied. What was meant by the New York court Thompson vs. Van Vechten, 27 N. Y., 568, is discussed in case of Skilton vs. Codington, 185 N. Y., 80 (this brief, 3).

n the case of Cooper vs. Brook, 41 Mich., 488, the Supreme rt of Michigan held that if a chattel mortgage is with-from record, the right of "subsequent" creditors to avoid annot be defeated by any proof of good faith on the part ne mortgagee. *"The statute declares the instrument shall bsolutely void and nothing short of a change of posses-or filing as the section requires, can save it."*

In the case of Putnam vs. Reynolds, 44 Mich., 113, the chattel mortgage was given April 9, 1876. It was not filed in accordance with the terms of the statute, and therefore, in the language of Judge Cooley, became, "by the express terms of the statute, absolutely void as against the creditors of the mortgagor." On July 7 following, Reynolds having become insolvent, made a general assignment for the benefit of creditors to defendant Fitzgerald, who had no knowledge of the mortgage, and the assignee took possession and proceeded to make a sale of the goods in the execution of his trust under the assignment. Then Putnam filed his mortgage, demanded possession (which the assignee refused to give) and then filed a bill to foreclose the chattel mortgage. Putnam claimed that his mortgage, notwithstanding the failure to file it, was perfectly good as against the mortgagor and that the latter could not by a voluntary assignment, transfer a right to assail it which he did not himself possess. Judge Cooley said:

> "The assignee is not a purchaser for value, and not a creditor; and even creditors, it is said, cannot attack the mortgage except indirectly through a seizure of the property by attachment or other suitable process. This is doubtless true where the invalidity of the mortgage arises from the fraud of the mortgagor, but whether the same rule will apply when the mortgage was originally valid, but is made void by the neglect of the mortgagee, may well be questioned. *It would be easy to suggest weighty considerations arising in such cases, but not existing in the case of a fraudulent mortgage,* and which it might well be thought should control. But we do not think the question fairly arises in this case."
>
> "As matter of law the mortgage of complainant was void as to the mortgagor's creditors, and *it was made void for the reason that the conduct of the mortgagee, even when he had no such purpose in view, tended to defraud them.* If the mortgage was purposely left off the record, it was an act of bad faith, which might justify its being declared void in fact irrespective of the statute (Shipman vs. Seymour, 40 Mich., 274); and there is reason to believe that such was the fact here, and that it was done to give the mortgagor a credit to which he was not entitled. *But whether the mortgage was void in fact as against creditors, or merely void in law, it is plain that the mortgagee cannot have a shadow of equity to enforce it as* against a trustee for the creditors who is proceed-

ing to dispose of the property in good faith for their benefit."

In Wallen vs. Rossman, 45 Mich., 333, the mortgagee by ason of erroneous information given him put his mortgage record in the wrong office. *There was evidence that the ortgagee had taken possession of the property before one of e attachments was levied; but the Court held that this was material and that the mortgage is void as to the "subsequent" creditors notwithstanding the possession taken by the ortgagee before the attachment.*

In Waite vs. Mathews, 50 Mich., 392, the distinction which e contend for was made by the Supreme Court. The action as by a mortgagee against a sheriff who had levied an attachment after possession was taken by the mortgagee. The aim of the attaching creditor had existed before the mortge was given. The Supreme Court said:

> "That in order to make the application of the statute making a mortgage, whether honest or not, absolutely void for want of filing or possession, some act must be done or some detriment sustained during the interval; that *as against all such rights a mortgage without such possession or filing is absolutely, not presumptively, void.*"

The Court called attention to the fact that in Wallen vs. ossman, 45 Mich., 333, the debt against which the mortgage as held void even though possession was taken before levy, as a *"subsequent"* debt.

In Crippen vs. Fletcher, 56 Mich., 386, Jacobson was the btor and had given Fletcher, the garnishee defendant, a attel mortgage on May 9, 1894. This mortgage was not corded until May 15th, upon which day Fletcher also took ssession of the property. Between the giving and the reving of the mortgage the debtor incurred a number of bts *upon which suit was brought after the mortgage was corded and Fletcher had taken possession.*

The Supreme Court, through Judge Campbell, said:

> "We have heretofore held that a chattel mortgage not seasonably filed is void and not merely presumptively void against creditors whose rights intervene between the making and filing. Haynes vs. Leppig, 40 Mich., 607; Hurd vs. Brown, 37 Mich., 484; Fearey vs. Cum-

mings, 41 Mich., 383; Cummings vs. Fearey, 44 Mich., 39; Waite vs. Mathews, 50 Mich., 392; Wallen vs. Rossman, 45 Mich., 333. *The law does not require previous proceedings to exhaust other remedies.* The garnishee law is unconditional upon this subject, and garnishee proceedings will reach the assets if they exist. *When the debt is not incurred on the credit of an apparently clear title which is in fact covered by a secret mortgage, the cases cited hold that there is no right to complain of a subsequent mortgage without taking some step which puts the creditor on a different legal footing than that of a quiescent party. But when a chattel mortgage exists and is concealed, it is under the statute void for the reason that it produces a false appearance of entire solvency when in fact a person known to have mortgaged his stock would not be as likely to get credit as one who had given no such security; and those who deal with such a debtor are liable to be defrauded by appearances. One who gives credit under such circumstances is necessarily exposed to that mischief, and the law has removed all questions of suspicion or notice by making chattel mortgages void,* AT ALL EVENTS, *against creditors who deal with a debtor so situated.* SUCH CREDITORS ARE DIRECTLY WITHIN THE POLICY OF THE STATUTE."

In Root vs. Harl, 62 Mich., 420, the question arose as to the validity of an unfiled mortgage as against (1) an assignee for the benefit of creditors, (2) a creditor who had taken a mortgage subject to the unfiled mortgage and (3) general creditors. The debtors, Harl and Stevens, executed to Rumsey on April 13, 1883, a chattel mortgage which was not recorded until July 16, 1883. After this mortgage was recorded the debtors executed an indemnity mortgage for $500.00 to one French, which mortgage apparently was duly recorded. Upon the following day the debtors executed a general assignment. Creditors who had extended credit in ignorance of the mortgage after it was given but before its recording, filed a petition in the assignment proceedings asking for the appointment of a receiver in the place of an assignee. Proofs were taken and the Supreme Court held that the Rumsey mortgage was absolutely void against the creditors who had extended credit between the time it was given and the time it was recorded in ignorance of its existence, but was valid as against French and all precedent creditors; that as against the debtors' exemptions the Rumsey mortgage was valid because the debtors had the right as against creditors to do as they pleased with

heir exemptions. Thereupon the Court ordered a decree as ollows:

> "We think, therefore, that the decree of distribution should be framed on these principles: It should, after making allowance for expenses and charges out of the general fund, and not out of the preferred fund, direct the amount of $1,900, and interest from the date of the Rumsey mortgage, to be paid as follows: Five hundred dollars to Rumsey for exemptions; the remainder to be divided ratably between complainants and the other creditors whose claims were made or affected, as before mentioned, during that interval, so far as it will go. Next, the French mortgage to be paid in full, if the fund arising from the sale of the mortgaged property will suffice.
>
> "Lastly, for the balance due Rumsey on his mortgage, and for any balances due the complainants and the other partly-paid creditors, as aforesaid, they will participate ratably in the distribution of the residue."

It will be noted that no "subsequent" creditor had fastened y kind of a lien on the property, either before the mortgage s filed or before the assignment for the benefit of creditors s made.

In Brown vs. Brabb, 67 Mich., 17, the Supreme Court of chigan, through Mr. Justice Champlin, laid down the rules th reference to the validity of unfiled chattel mortgages. hn J. Ryan & Co. was a co-partnership consisting of John Ryan and one Brewster. On January 4, 1884, Ryan in firm name gave a chattel mortgage to defendant Brabb for 928.67 to secure an antecedent debt, there being an agreeit that the mortgage should be left with the township k with instructions not to file unless some other mortgage the same property should be presented for filing. The clerk so instructed. On January 14, 1884, John J. Ryan & Co. le an assignment for the benefit of creditors to complain- Brown as assignee. On January 21 following Brabb filed mortgage and demanded the property from the assignee it was refused. Brabb refused to institute any proceed- but insisted that he would hold the assignee liable for value of the property if he did not pay up the amount of mortgage. Whereupon the assignee for the benefit of itors filed a bill to cancel Brabb's mortgage as fraudulent.

ne assignee was in possession of the property. *There , however, no creditors who had extended credit while*

*the mortgage was unfiled or who had changed their position during that interval.* The Supreme Court of Michigan held that had there been such creditors, the assignee could have asserted the invalidity of the mortgage as to them, but in the absence of such creditors, the rights of the assignee were subordinate to the rights of the mortgagee, although the mortgagee had never been in possession and the assignee had obtained possession before the mortgage was recorded and in ignorance of it. The decision of the Supreme Court of Michigan in Brown vs. Brabb was not based upon any theory that a subsequent creditor had to have a lien, either legal or equitable, before an unrecorded mortgage could be declared void as to him. A comparison of Root vs. Harl, supra, and Brown vs. Brabb will, we think, show distinctly the correctness of our position.

In the same volume as Brown vs. Brabb is to be found the case of Buhl Iron Works vs. Teuton, 67 Mich., 623. In that case the distinction for which we are contending was made. A mortgage in the form of a bill of sale had been given by debtor, the Detroit Tug & Transit Co., to the Buhl Iron Works, but the instrument was never recorded nor was there a change of possession. Teuton, McWilliams & Co., also creditors, *but whose claim antedated the giving of the mortgage,* began a proceeding in attachment on the 11th day of February, 1886, and levied attachments upon the machinery covered by the bill of sale before there was any actual change of possession or the bill of sale was recorded. Thereupon the Buhl Iron Works, after making demand on the sheriff, brought replevin. The Supreme Court of Michigan held that if the instrument were in fact a chattel mortgage and was unrecorded, Teuton, McWilliams & Co. had by their attachment acquired a priority over such unrecorded mortgage, saying:

> "Under the section last cited, the mortgage, or conveyance intended as security, of property, where there is no immediate delivery and actual and continued change of possession, is actually void *as to creditors who have obtained liens upon the property, or who became such after the giving of the security,* unless such conveyance is filed as provided in the statute. Under this section the question of good faith and intent is immaterial."

The Court will note the distinction made by the Supreme Court of Michigan, and that a creditor who extended credit while the mortgage was unrecorded and in ignorance of it,

is placed upon the same footing so far as the validity of such mortgage is concerned, with a precedent creditor who has obtained a lien upon the property before its recording and before possession is taken under it.

In Cutler vs. Steel, 85 Mich., 627, the question again arose. In that case the debtor, Steel, on July 12, 1889, executed a chattel mortgage to Cutler, which mortgage was not recorded until August 29, 1889. During the interval creditors had renewed paper upon which Steel was endorser. Later the holders of these notes sued Steel, obtained judgment and levied upon the property covered by the mortgage denying its validity. Thereupon Cutler filed a bill to foreclose the chattel mortgage, and it was held by the Supreme Court that the holders of notes endorsed by Steel had changed their position during the time that the mortgage was unrecorded and that as to them, although the mortgage had been recorded before they had fastened any lien upon the property, such mortgage was void.

Another branch of the same matter came to this court. In the case of Cutler vs. Huston, 158 U. S., 423, the plaintiff had received in the interval between the giving and the filing of the mortgage to Cutler, a note endorsed by Steel as a part of her share of her deceased husband's estate. When the note went to protest, suit was brought by her in the United States Court at Grand Rapids, and Cutler, the chattel mortgagee, was garnisheed. It was held that the mortgage was void as against Mrs. Huston by reason of the fact that she had changed her position in the interval that the mortgage was not recorded. In that case Cutler had recorded his mortgage and had taken possession of the property covered by the mortgage long before the institution of the suit of Mrs. Huston.

In Dempsey vs. Pforzheimer, 86 Mich., 652, the question arose as between the owner of an unfiled chattel mortgage and a subsequent chattel mortgagee who took his subsequent mortgage with full knowledge of the existence of the first mortgage *and after it had been recorded*, but the claim which the mortgage was given to secure arose between the giving and the recording of the mortgage. In that case the authorities are carefully reviewed, and the Supreme Court of Michigan held that a mortgagee who takes a second mortgage with full knowledge of the existence of a first mortgage, afterwards recorded, might nevertheless assert the invalidity of such first mortgage *if the claim secured by such second mortgage arose in ignorance of the existence of the mortgage.* It will be noted

upon a careful reading of the opinion that unfiled chattel mortgages are as to subsequent creditors, placed in exactly the same category as mortgages fraudulent in fact, and that anyone who is in a legal position to attack one is in a corresponding legal position to attack the other. A comparison of this case with that of Peoples Savings Bank vs. Bates, 120 U. S., 556, shows that the superior rights recognized in the Dempsey vs. Pforzheimer case arose from the fact that the superior rights resulted from the nature of the debt secured by the mortgage and not from the mortgage itself.

In Kennedy vs. Dawson, 96 Mich., 79, the Supreme Court again laid down the doctrine that an unfiled chattel mortgage is absolutely void as against creditors whose claims accrued in the interval between the giving and the recording of the mortgage. McCarthy, the debtor, gave a chattel mortgage to Kennedy for $3,500.00 on October 12, 1891. The mortgage was withheld from record until December 22, 1891, when it was duly filed. More than a month later McCarthy made a general assignment to Dawson, who took possession and advertised the property for sale. Subsequently the mortgagee demanded possession and on refusal of the assignee to deliver possession, brought replevin. McCarthy had bought goods to a value in excess of $1,000.00 after the giving of the mortgage and prior to its filing. The Supreme Court of Michigan held that the mortgage was *void as against the assignee so far as he represented subsequent creditors, but valid so far as he represented precedent creditors, and that any person actually prejudiced by the delay in the filing of the mortgage might assert the invalidity thereof.*

In the case of Lord vs. Wirt, 96 Mich., 415, the court laid down the doctrine that the withholding of a mortgage from record was not ground for a creditor, who had extended credit while the mortgage was unfiled, to attach. This ruling was based upon the theory that such unfiled mortgage was absolutely void against him, and he needed no attachment to attack said mortgage; nor was he injured thereby. *Of course if a lien was necessary for such subsequent creditor to assert the invalidity of the unfiled mortgage the Supreme Court of Michigan could not have reached the conclusion that it did.*

In the case of Vining vs. Millar, 116 Mich., 144, the Court reviewed the previous authorities upon the proposition, and held that a second mortgage based on a "subsequent" debt given while a previous mortgage was unfiled, had priority over such previous mortgage although such second mort-

gage was itself not properly filed and even though the second mortgagee had not taken possession of the property by virtue of it. This holding was by reason of the fact that the nature of the claim secured by such second mortgage, to-wit, that it was a claim which accrued while the first mortgage was unfiled, gave it priority over such first mortgage.

We now come to the consideration of the two cases of Heineman vs. Schloss, 83 Mich., 153, and Baker vs. Parkhurst, 119 Mich., 542.

In Heineman vs. Schloss the facts were these: One Rachel Solomon was engaged in business in the northern part of Michigan. She gave a chattel mortgage to Schloss Bros. of Detroit, creditors, which mortgage was duly recorded. The mortgage was foreclosed and Schloss Bros. & Company received the proceeds of the foreclosure. Subsequent to this transaction the legislature amended the garnishment law of Michigan so that a garnishee could be held liable for the proceeds of property previously held by a conveyance of title, void as to creditors. (This brief, pp. 5-6.) Thereupon the firm of Heineman, Butzel & Company, of Detroit, also creditors of Mrs. Solomon, brought suit against her and garnisheed Schloss Bros. & Company to reach the proceeds of the foreclosed mortgage. The principal controversy was as to whether garnishment could be invoked in such a case inasmuch as the amendment had been passed after the transaction sought to be attacked, but the Supreme Court held that:

> "The garnishee law is purely a remedial statute. It gives no rights and creates no liabilities. Everything that can be accomplished by means of it could have been accomplished by other means if the garnishee law had never been passed. Counsel for defendants says:
>
> > 'Under the mortgage, defendants' sale of the property was valid under the law as far as plaintiffs are concerned. Could the legislature, by the amendatory enactment, give the plaintiffs a claim upon such property or its value, and make defendants liable therefor?'
>
> "The trouble with this inquiry is that it does not correctly state the situation of the defendants with reference to this property. If the mortgage under which they took the property was fraudulent, the mortgagees obtained no rights under it, and could not lawfully exercise any rights, as mortgagees, over the property under it. The funds received by them on a

sale of the property remained in their hands as equitable assets for the benefit of the creditors of the mortgagor. Under the statute, as it existed prior to the amendment of 1889, this fund could not be reached by garnishment, but it was liable to be reached in equity. The effect of the amendment is not to enlarge the liability of the defendants, but to render them liable at law instead of in equity, as formerly. Treating the garnishee statute, then, as one affecting the remedy merely, it is not giving the statute of 1889 retroactive effect to apply it to suits commenced after the act took effect, simply because the transaction upon which the suit is based took place before that time.

In determining whether a statute is retroactive in its effect, regard must be paid to the purpose of it. If the statute is one that confers new rights or creates new liabilities, then to apply it to past transactions, so that new rights and liabilities spring up where none existed when such tranasctions occurred, is to give it retroactive effect; but when the statute is one giving a new or different remedy for a pre-existing right or liability, then it is not retroactive, as applied to suits commenced after the act has taken effect, because past transactions are involved in such suit. In the latter case the statute does not relate to or attempt to characterize transactions, but gives a certain remedy therefor, and the remedy may be pursued at once after the act takes effect."

We have heretofore called attention to the Michigan authorities to the effect that a creditor who has extended credit while a mortgage is off the file, has, as to such mortgage and the holder thereof, exactly the same rights and remedies that a creditor attacking a mortgage actually fraudulent in fact, has. The case of Heineman vs. Schloss is authority for the proposition that wherever garnishment would lie, equity would also furnish an adequate remedy.

In Baker vs. Parkhurst, 119 Mich., 542, the facts were these: L. K. Parkhurst & Co. were bankers at Reed City. Welsh, the debtor, was indebted to Parkhurst & Co. in the sum of upwards of $15,000. On February 27, 1897, Welsh executed a chattel mortgage on all his personal property to Parkhurst & Company and gave them other security as well. The mortgage was withheld from the files until June 24, 1897, and the debtor remained in possession of the mortgaged

property as apparent owner. While these mortgages were withheld from record and without knowledge or intimation of their existence, the plaintiff sold to Welsh considerable quantities of lumber on credit. On July 23, 1897, the mill plant, machinery, etc., and everything belonging to the mill were conveyed to W. E. Williams, a brother-in-law of Parkhurst, and it was understood that the amount that Williams paid for the plant should be applied upon Parkhurst & Company's mortgage upon the plant, and that such part of the plant as Williams purchased should be released from the mortgage. It was found that the transfer of Williams' check from Welsh to Parkhurst & Company was intended as a payment of Welsh's indebtedness to that extent and was so treated by a surrender of Welsh's notes to that amount. The lower court held that there was no actual fraud in the case, and that therefore the plaintiffs could not recover against the holder of the unfiled chattel mortgage which had been satisfied by the payment by Williams to Welch and by Welch to the mortgagee of the amount received in consideration of the transfer of the property; that inasmuch as there was a bona fide indebtedness from the mortgagor to the mortgagee existing long before and independently of the mortgage, Welch could recognize and pay this whenever he chose, and that a voluntary payment of a debt secured by a void mortgage did not subject the mortgagee to liability for the amount so received.

The Supreme Court of Michigan took the opposite view and held that when a mortgagee receives in payment of a debt secured by an unfiled chattel mortgage, the proceeds of a sale of the property covered by the mortgage and the mortgage is taken into consideration in the transaction, the mortgagee under such circumstances is just as liable as if the mortgagor had taken possession under the mortgage, saying:

> "We think that the facts lead inevitably to the conclusion that, *by the arrangement that Parkhurst & Co. should release their mortgage on the property sold,* Parkhurst & Co. received the proceeds of the chattel-mortgaged property, within the meaning of this statute (3 How. Stat., Sec. 8091), which provides that:
>
> 'If any person garnished shall have received and disposed of any of the property aforesaid of the principal defendant which is held by a conveyance or title that is void as to creditors of the defendant, he may be adjudged liable as garnishee on account of such property, and for the value thereof.'

"The taking of these mortgages, and leaving them off the record was a fraud in law, if not in fact, against the plaintiff; for, during the time they were left off the record, the principal defendant was enabled to obtain credit, as he was apparently the owner of all the property, free and unincumbered. Having obtained this credit while the mortgages were kept from the record, the garnishee defendants could assert no rights under the mortgages as against the plaintiff. If they had taken the property under the mortgages, it is admitted that they would have been liable to garnishment, under the statute, for the value thereof. Instead of doing that, the parties got together, and 'taking the mortgages into consideration,' arranged a sale to Williams, the garnishee defendants releasing the mortgages. In effect, the same result is reached as though the garnishee defendants had taken the property on the mortgages. By keeping them off the record they had enabled Welsh to obtain a credit. After this was obtained they put their mortgages on record, and now seek to shield themselves by saying that they did not take this property; that they have none of the proceeds of it coming to them by a void mortgage; that it was a valid sale to Williams by Welsh; and that the proceeds of the sale, not obtained under the mortgage, were paid over to them on a valid debt. We think such a contention should not be sustained. In Folkerts vs. Standish, 55 Mich., 463, there was no evidence that the lumber was turned out on the chattel mortgage, or that the defendant received or took possession of it under or by virtue of the mortgage, and it was therefore held that the Court could not follow the proceeds into the defendant's hands. In Heineman vs. Schloss, 83 Mich., 153, this garnishee statute was under consideration, and it was held that the defendant was liable as garnishee for the proceeds of the sale of the property taken under a void mortgage. It is true that in that case there was no question but that the property was received upon the mortgage; but we are of the opinion that this record shows that the proceeds of the sale received by the garnishees were in fact the proceeds of the mortgage. Mr. Parkhurst testified that Welsh could not dispose of the property without paying the mortgage, and that he so told Williams. This is what all the parties understood, and in arranging the sale they evidently treated the mortgages as though they were valid."

## IS THE REQUIREMENT THAT PROCEEDINGS MUST BE BROUGHT TO FASTEN ON THE PROPERTY OR ITS PROCEEDS A MATTER WHICH AFFECTS THE RIGHT OR AFFECTS MERELY THE REMEDY?

In the early part of this brief we stated (page 11) that we would discuss the case of Thompson vs. VanVechten, 27 N. Y., 568, referred to in the case of Feary vs. Cummings. This is the appropriate place to do so, and we cannot do so better than in the language of the Court of Appeals of New York used in the case of Skilton vs. Codington, 185 N. Y., 80. In that case was distinctly raised the right of a trustee in bankruptcy to assert the invalidity of a chattel mortgage not filed in behalf of creditors not armed with any lien prior to the filing of the bankruptcy petition. The Court says:

> "By reason of the failure to file the chattel mortgage for five years that mortgage was void as against creditors whose claims accrued prior to such filing. Lien Law, Sec. 90, Chap. 418, Laws of 1897; Thompson vs. Van Vechten, 27 N. Y., 568: 'A creditor by simple contract is within the protection of the statute as much as a creditor by judgment, but until he has a judgment and a lien, *or a right to a lien upon the specific property*, he is not in a condition to assert his rights by action as a creditor.' Southard vs. Benner, 72 N. Y., 424; Karst vs. Gane, 136 N. Y., 316. In Stephens vs. Perrine, 143 N. Y., 476, the mortgagee had obtained possession of the mortgaged property and sold the same prior to the recovery of a judgment by the creditor. Nevertheless, the mortgagee was held liable to account to the creditor for the amount realized from the sale of the property. It was there said by Judge Peckham:
>
> > 'The mortgage as to the creditors of the mortgagor was always void. * * * The action is against the mortgagee, and I cannot see the force of the reasoning which, while admitting that the mortgage is void as to creditors, nevertheless asserts that a title to the property covered by it may be obtained by the mortgagee by proceedings taken under it, and which asserts the validity of such instrument, provided they are taken before the creditors are armed with a judgment and execution so as to enforce their rights which rest upon the invalidity of the mortgage.'
>
> "This decision seems to me controlling on the point we are now considering. It is true there is to be found

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# CARD 2

in some cases a statement that the mortgage is void only as to judgment creditors. This statement, if construed in the light of the circumstances of the case before the Court and with reference to the context of the opinion, is substantially correct, though not strictly accurate as a general proposition. The question is quite similar to that of the right of an attaching creditor to seize goods fraudulently transferred by his debtor. That he has such right is settled by authority. Rinchey vs. Stryker, 28 N. Y., 45, 84 Am. Dec., 324; Frost vs. Mott, 34 N. Y., 253; Hess vs. Hess, 117 N. Y., 306. In the first of these cases the same argument was made as is now presented, that the transfer was void only as to judgment creditors, and numerous dicta of eminent judges were quoted in support of that position. This Court held that all that was meant by the expression was that a creditor could not attack the fraudulent transfer until he had obtained some process which authorized the seizure of the debtor's property. That is the true interpretation of the dicta relating to unfiled chattel mortgages. The rule that a creditor must first recover a judgment is simply one of procedure and does not affect the right. Therefore, where the recovery of a judgment becomes impracticable it is not an indispensable requisite to enforcing the rights of the creditor. So it was held that an assignee in bankruptcy could, for the benefit of creditors, attack a fraudulent mortgage, though if a creditor had sought that relief in his own name it would be necessary that his claim be first put in judgment. Southard vs. Benner, supra. Even where a statute, which secures to creditors liability of stockholders, provides in express terms for the recovery of a judgment and return of execution against the corporation, judgment and execution are unnecessary where they have become impracticable on account of the dissolution of the corporation or of an injunction restraining the prosecution of suits against it. Hardman vs. Sage, 124 N. Y., 32; Hunting vs. Blun, 143 N. Y., 511; Lang vs. Lutz, 180 N. Y., 254. It is urged by the respondent that the unfiled mortgage was valid as between the parties and that the trustee in bankruptcy succeeds only to the rights of the bankrupt and, hence, cannot attack the mortgage for default in filing. This was the law under the Bankrupt Act of 1867. Stewart vs. Platt, 101 U. S., 731. But by section 67 of the present Bankrupt Act it is expressly provided that 'claims which for want of record or for

other reasons would not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate, a provision which was not found in the earlier statute. This seems to cover the case. The respondent, however, relies on two cases in the Federal courts as authority to the contrary. Hewitt vs. Berlin Machine Works, 194 U. S., 286, 11 Am. B. R., 709, and In re New York Economical Printing Co., 6 Am. B. R., 615, 110 Fed. 514, 49 C. C. A., 133. The case in the Supreme Court is not in point. That arose under section 112 of the Lien Law, which provides that reservations of title in contracts for the conditional sale of goods and chattels unless filed as directed by the statute shall be void as against subsequent purchasers, pledgees or mortgagees in good faith. But there is no provision that it shall be void as against creditors. This is the vital distinction between the law applicable to such contracts and that prescribed as to chattel mortgages. The Court held that the trustee in bankruptcy was not a purchaser in good faith from the mortgagor and, hence, could not attack the contract, but observed in conclusion:

> 'We concur in this view which is sustained by decisions under previous bankruptcy laws and is not shaken by a different result in cases arising in States by whose laws conditional sales are void as against creditors.'

"The case in the Circuit Court of Appeals is in point, and it was there held that a trustee in bankruptcy could not attack a chattel mortgage for default in filing. As appears by the opinion the result was reached on the assumption that by the law of the State of New York a non-filed chattel mortgage was void only as to judgment creditors obtaining a lien, not as to general creditors. We think the very eminent judge who wrote in the case misconceived the law of the State in this respect. If it were a Federal question we would follow the decision regardless of our own opinion, but as the question is as to the law of this State we must adhere to the prior decisions of this Court. It is to be further observed that in a subsequent case in the Circuit Court (In re Kellogg, 11 Am. B. R. 710 note, 118 Fed. 1017), which arose under the conditional sale statute, the decision was placed on the ground that the statute did not render such contracts void as against creditors, and it was pointed out, that decisions in States where such sales are void

as against creditors were not in conflict with the decision. In the case before us, it appears that almost all the debts of the bankrupt were incurred prior to the filing of the mortgage.

"Since the foregoing was written, the Supreme Court of the United States has decided the case of York Manufacturing Company vs. Cassell, 201 U. S. 344, 15 Am. B. R., 633, in which it was held, reversing the decision of the United States Circuit Court of Appeals of the Sixth Circuit, that under the laws of the State of Ohio an assignee in bankruptcy takes the property of the bankrupt subject to the lien of an unfiled contract of conditional sale, which in that State is void as against creditors as well as against subsequent purchasers. I understand by the opinion there delivered by Mr. Justice Peckham that the decision proceeds on the ground that under the State law as construed by the courts of the State in reference to chattel mortgages (Wilson vs. Leslie, 20 Ohio, 161) a conditional contract is void only as against those creditors who, before the contract or mortgage is filed or before the vendor or mortgagee obtains possession, seize the property on execution or attachment. This, as shown in the opinion delivered by Judge Peckham in the case of Stephens vs. Perrine, already cited, is not the law of this State. With us the mortgage is void, as to simple contract creditors, but such creditors cannot attack it until the recovery of a judgment and issue of execution. Then they can seize the mortgaged property whether the mortgagee has filed his mortgage or taken possession; though otherwise if the mortgagor has by subsequent action made a valid alienation. This principle has recently been reasserted by the Court in Russell vs. St. Mart, 180 N. Y., 355."

## FEDERAL CASES.

This Court in the case of Knapp vs. Milwaukee Trust Company, 216 U. S., 545, held that where an instrument is void under the State law as to creditors, the fact that the transaction is valid as between the parties would not prevent the trustee in bankruptcy from alleging that it was constructively fraudulent as to creditors even though such creditors had fastened no lien upon the property before the adjudication (citing Security Warehousing Co. vs. Hand, 206 U. S., 413).

In Security Warehousing Co. vs. Hand, supra, this Court rough Mr. Justice Peckham reviewed the various cases in s Court relating to the rights of a trustee to assert the ims of creditors, and said among other things:

> "This Court had theretofore approved the remark in re New York Economical Printing Co., 49 C. C. A. 133, 110 Fed. 514, 518, that the present bankrupt act contemplates that a lien good as against the bankrupt and all of his creditors at the time of the filing of the petition in bankruptcy should remain undisturbed. Hewitt Case, supra. Upon these facts it was reiterated that the trustee takes the property as the bankrupt held it.
>
> The case at bar bears no resemblance in its facts to the case just cited. There was no valid disposition of the property in the case before us, or any valid lien. The so-called warehouse receipts issued by the warehousing company to the knitting company, upon the facts of this case, gave no lien under the law in Wisconsin, in which State they were issued. In such case this Court follows the State court. Etheridge vs. Sperry, 139 U. S. 266, 35 L. Ed. 171, 11 Sup. Ct. Rep. 563; Dooley vs. Pease, 180 U. S. 126, 45 L. Ed. 457, 21 Sup. Ct. Rep. 308.
>
> By Sec. 70a, the trustee in bankruptcy is vested, by operation of law, with the title of the bankrupt to all property transferred by him in fraud of his creditors, and to all property which, prior to the filing of the petition, might have been levied upon and sold by judicial process against him; and, by Subdivision (e) of the same section, the trustee in bankruptcy may avoid any transfer by the bankrupt of his property which any creditor of the bankrupt might avoid, and may recover the property so transferred, or its value. Here are special provisions placing the title to the property transferred by fraud or otherwise, as mentioned, in the trustee in bankruptcy, and giving him the power to avoid the same."

## CASES IN THE LOWER FEDERAL COURTS.

he right of a trustee to attack an unfiled chattel mortgage the benefit of subsequent creditors who had acquired no prior to the recording of the instrument or the filing of petition in bankruptcy was successfully asserted in the of In re Beckhaus, 100 C. C. A. 561, 177 Fed. 141. Judge

Baker, speaking for the Circuit Court of Appeals for the Seventh Circuit, said:

> "When it is said that a fraudulent transfer is void only as to judgment creditors, the expression means no more than that a creditor cannot seize his debtor's property until he has obtained some process which authorizes the seizure. As stated in Skilton vs. Codington, 15 A. B. R. 810, 185 N. Y., 80; 77 N. E., 790; 113 Am. St. Rep., 885.
>
> 'The rule that a creditor must first recover a judgment is simply one of procedure, and does not affect the right. Therefore, where the recovery of a judgment becomes impracticable, it is not an indispensable requisite to enforcing the rights of the creditor.'"

Gerstman vs. Bandman, 157 Fed., 549, in which the Circuit Court of Appeals for the Second Circuit, by Judge Ward said:

> "This Court, In re Economical Printing Company, 6 Am. B. R. 615, 110 Fed. 514, 517, held that a nonfiled mortgage was void only as to creditors who by judgment or attachment or otherwise had seized or were in a position to seize the mortgaged property. Since that decision, however, the Court of Appeals of the State of New York has held that a non-filed mortgage is void as to general creditors, although it cannot be attacked until they are in a position to seize the mortgaged property by virtue of a judgment, attachment or otherwise. *This, however, is a mere matter of procedure and the mortgage is none the less void as to them.*
>
> Cullen, Ch. J., says in that case:
>
> 'As appears by the opinion, the result was reached on the assumption that by the law of the State of New York, a non-filed chattel mortgage was void only as to judgment creditors obtaining a lien, not as to general creditors. We think the very eminent Judge who wrote in the case misconceived the law of the State in this respect. If it were a Federal question, we would follow the decision regardless of our own opinion, but as the question is as to the law of this State, we must adhere to the prior decisions of this Court.' Skilton vs. Codington, 185 N. Y. 80, 15 A. B. R. 810.
>
> "As we are bound to follow the construction of the State law adopted by the highest court of the State,

the case of the Economical Printing Company must be held to have gone too far in deciding that a non-filed mortgage is valid as to general creditors.

"Regarding the mortgage as void, though not subject to attack because there were no judgments against the bankrupts at the time of the adjudication, the question is whether the trustee is in a position to attack it. We think he is.

The Bankruptcy Law of 1898 provides, Sec. 67 (2):

'Claims which for want of record or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate.

'(d) Liens given or accepted in good faith and not in contemplation of or in fraud upon this act, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall not be affected by this act.'

Sec. 70 (a):

'Trustee of the estate of a bankrupt upon his appointment of qualification * * * shall be vested by operation of law with the title of the bankrupt as of the date he was adjudged a bankrupt except in so far as it is property which is exempt to all. * * *

'(5) Property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him. * * *

"These provisions of the Bankruptcy Act, in our judgment fully authorize the trustee on behalf of the creditors to attack the chattel mortgages and having successfully done so, the petitions are dismissed and the orders of the District Court are affirmed with costs."

e call attention to the case of In Re Standard Telephone ctric Company, 157 Fed., 106, which was the same case ned by this Court under the name of Knapp vs. Milwaukee t Co., U. S. 545, in which Judge Quarles said:

"It is also true that the effect of the filing of a petition in bankruptcy as laid down in Mueller vs. Nugent, 184 U. S., 1; 7 Am. B. R., 224; 22 Sup. Ct., 269; 46 L. Ed., 405, has been modified by the Supreme Court in York Manufacturing Company vs. Cassell, 201 U. S.,

344; 15 A. B. R., 633; 26 Sup. Ct., 481; 50 L. Ed., 7282, so that the institution of bankruptcy proceedings no longer has the effect of an attachment or an injunction; but the Supreme Court of Wisconsin has squarely decided in Mueller vs. Bruss, 8 A. B. R., 422; 112 Wis., 406; 88 N. Y., 228, that a trustee in bankruptcy under the present act, representing only creditors at large, may maintain an action in equity to set aside transfers of property by the bankrupt in fraud of creditors. This is put upon the ground that the Bankruptcy Act renders it practically impossible for creditors to comply with the equitable rule, and that equity does not demand impossibilities. Jackman vs. Bank, 125 Wis., 476; 104 N. W., 98.

"Thus it appears that the general doctrine of equity that to institute such a suit a creditor must be armed with a judgment and execution is observed in Wisconsin, but that such rule is one of procedure only, and not a condition precedent. The same doctrine is held in Skilton vs. Codington, 15 A. B. R., 810; 185 N. Y., 80; 77 N. E., 790; 113 Am. St. R., 885. This authority is the more persuasive because Wisconsin borrowed its statute from New York. The Wisconsin law in favor of simple creditors commends itself to me on stronger grounds than mere comity. It is in harmony with the spirit of the bankruptcy law.

"Fourth Street National Bank vs. Milbourne Mills, 172 Fed., 177; 96 C. C. A., 629; 22 A. B. R., 442. Pontiac Buggy Co. vs. Skinner, 20 A. B. R., 158 Fed., 858. Thomas, Trustee, vs. Roody, 19 A. B. R., 873; 122 App. Div., 852 (N. Y.). In Re Hickerson, 20 A. B. R., 692; 162 Fed., 345. Dunn Salmon & Co. vs. Pillmore, 19 A. B. R., 177; 106 N. Y. S., 546, holding that the right to attack an unfiled mortgage must be asserted by the trustee and cannot be asserted by an individual creditor, even though armed with a judgment and execution returned unsatisfied.

"Re Watts-Woodward Press, 24 A. B. R., 684; 181 Fed., 71. Re Hartman, 26 A. B. R., 76; 185 Fed., 196. In Re Schmidt, 24 A. B. R., 687; 181 Fed., 73."

## CONCLUSIONS.

We think it is clear from the Michigan authorities cited that had not bankruptcy proceedings been brought the creditors who extended credit while the mortgage was off the file might have sued Coates and brought garnishment against the Pontiac Savings Bank and recovered. Or had they chosen to do so, they could have taken judgments against Coates, had executions issued and returned unsatisfied, and thereupon filed creditors' bills and had a receiver appointed for Coates, which action under all the authorities would have given an equitable lien upon any property transferred by him under an instrument void as to such creditors.

*Metcalf vs. Barker,* 187 *U. S.,* 165.

Such creditors with judgments based upon subsequent debts and with executions returned unsatisfied could, either themselves or through the receiver, have held the Pontiac Savings Bank liable up to the amount of their respective claims, and this regardless of when the mortgagee had recorded his mortgage or had taken possession thereunder, or received payment thereof, provided the proceedings were instituted at a time when they were not barred by the statute of limitations.

Did the filing of the petition in bankruptcy cut off the right of the subsequent creditors to thus assert the invalidity of the mortgage as to them; and if it did not, has not the trustee in bankruptcy, under Section 70, the right to assert such invalidity for such subsequent creditors, inasmuch as Section 70-e provides that the trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a bona fide holder for value prior to the date of the adjudication?

The mortgage to the Pontiac Savings Bank was void as to subsequent creditors whether they ever attacked it or not.

*The filing of the petition in bankruptcy could not give it validity,* and yet that must be the effect of the ruling of the Circuit Court of Appeals in this case, if it be the law that the filing of the petition cut off the right of the subsequent creditors to secure a lien on the property so covered by the

unfiled chattel mortgage, and that such a lien (rather than a right to a lien) is necessary before the invalidity of the instrument may be asserted.

Suppose, instead of Coates having been adjudged a bankrupt (and thereby become financially dead), he had in fact died. In such a case, the creditors who had extended credit while the mortgage was off the files could not thereafter have obtained judgment against him upon which either garnishment or creditors' proceedings could have been maintained. Under such circumstances, would Coates' death have made the mortgage valid in view of the holding of the Supreme Court that it was absolutely void as to such subsequent creditors? We think not.

It was never the intention of Congress to take away from creditors a right to attack an instrument void as to them without at the same time transferring that right to the trustee for their benefit, and there is no decision of this Court (in spite of the view of the Circuit Court of Appeals to the contrary) holding to that view. Every decision of this Court in which a trustee was held not to have the right to attack an instrument by reason of its non-recording, was based upon the fact that under the laws of the State in which the case arose, no creditor had the right so to do and the rights of the trustee did not rise higher than the rights of the creditors whom he represented. The decisions of the Supreme Court of Michigan are unanimously to the effect that the unfiled mortgage is *absolutely* void as to creditors who extended credit without knowledge of its existence while it was unfiled. We insist that the trustee in bankruptcy may, for such creditors assert the invalidity thereof, and that the necessity for the creditors obtaining judgments and having executions thereon returned unsatisfied does not exist, the only purpose of taking judgment and having execution returned unsatisfied being to establish the right to go into equity. The adjudication in bankruptcy and the appointment of a trustee by which all of the assets of the debtor are sequestered has the same effect as the obtaining of a judgment and the returning of an execution unsatisfied so far as the right to file equitable proceedings thereafter is concerned.

Firestone Tire & Rubber Co. vs. Agnew, 194 N. Y., 164; 15 Am. & Eng. Anno. Cases, 1150 (and the numerous cases cited in the note). Skilton vs. Codington, 185 N. Y., 80 (supra).

## IN RE HUXOLL.

This leaves, we think, for discussion, only the case of "In Re Huxoll," 193 Fed., 851; 113 C. C. A., 637. The learned Judges of the Circuit Court of Appeals held the case of "In Re Huxoll" rules the case at bar (R., 56). We insist that case presented an issue altogether different from the one now here. There a debtor had given to a creditor a mortgage which had never been filed. He subsequently gave a trust mortgage for the benefit of all creditors and a petition in bankruptcy and an adjudication followed. It was claimed in behalf of the subsequent creditors that not only was the unfiled mortgage void (*which fact the mortgagee conceded*), but also that the giving of the mortgage and the failure to record it postponed the mortgagee to all the other creditors, *a result which by no means logically followed.* We think the Circuit Court of Appeals properly held that the invalidity of the mortgage did not prevent the creditor secured thereby from proving his claim and participating upon the same basis as the other creditors, a result which exists even when voidable preferential payments are set aside. See Keppel vs. Tiffin Savings Bank, 197 U. S., 356; Page vs. Rogers, 211 U. S., 577; Barber vs. Coit, 144 Fed., 381 (C. C. A., Sixth Circuit).

It may be in the case at bar that if the Pontiac Savings Bank is obliged to pay to the trustee the amount of the claims of the subsequent creditors, such recovery will enure to the benefit of all creditors and that the Pontiac Savings Bank will be permitted to come in and file its claim, depending to a large extent upon how this Court will dispose of the case of Martin, Trustee, vs. Globe Bank & Trust Co., No. 99 on this docket—but that question is not here involved.

The reasoning of Judge Knappen in the case of "In Re Huxoll" is based upon his theory that it is necessary in order to reach the desired result to find that a trustee in bankruptcy did not have as much right to represent subsequent creditors as an assignee for the benefit of creditors in Michigan, apparently thinking that the Michigan decisions had absolutely established that in the case of an assignment for the benefit of creditors the right of the mortgagee must be postponed to that of subsequent creditors, a result which in the Huxoll case Judge Knappen thought ought to be avoided.

Judge Knappen apparently lost sight of the fact that in the two Michigan cases in which the assignee was permitted to assert a priority for subsequent creditors over the mortgagee, that result followed from the fact that the mortgagee was attempting to assert rights under the mortgage which would have given him priority against precedent creditors. Had, in either of the cases referred to, Root vs. Harl and Kennedy vs. Dawson, the mortgagee waived all rights under the mortgage and come in on the same basis as all of the precedent creditors, the subsequent creditors would and could have obtained no priority. Judge Knappen, quoting from the case of Krolik vs. Root, 63 Mich., 562, apparently misunderstood the holding of the Supreme Court of Michigan in that case. In that case which was in equity, the defendant held nothing and had received nothing under the unrecorded mortgage. What he had received he had received under a subsequent mortgage properly filed and of which the complainants had notice, and, of course, under such circumstances the complainant could not recover against such mortgagee. We do not claim, and we never have claimed, that the giving of a chattel mortgage and the withholding of it from record necessarily has the effect of postponing the holder of such security in the payment of his debt to the subsequent creditors. What we do claim is that the instrument under which the mortgagee holds the property or the proceeds thereof, being *absolutely* void as to the subsequent creditors, the property covered thereby or its proceeds passes to the trustee in bankruptcy, free from the lien of such mortgage, so far as the trustee represents subsequent creditors, and *that if the* mortgagee claims rights thereunder, the subsequent creditors are as to such rights subrogated thereto to the extent of the "subsequent" debts. The mortgagee cannot rely upon such invalid instrument and keep such property from the trustee in bankruptcy as representing subsequent creditors.

With all due respect for the learned Judges of the Circuit Court of Appeals we insist that although the result in the Huxoll case was right, the reasoning was wrong. *If* it is necessary in order to attack an unfiled mortgage that the subsequent creditors must have fastened upon the property in some way before the filing of the petition in bankruptcy and the trustee in bankruptcy does not represent such subsequent creditors and cannot assert the rights of such subsequent creditors to attack the invalidity of such mortgage for nonfiling *without a fastening on the property before bankruptcy, then and in such case the mortgagee in the Huxoll case, even though his mortgage was never filed, was entitled to a priority*

*over all the other creditors had he chosen to assert it.* We are satisfied that the Circuit Court of Appeals for the Sixth Circuit would have said that such is not the law had the motrgagee attempted to assume any such position; yet that result necessarily follows from the reasoning of Judge Knappen in the Huxoll case, because the chattel mortgage was valid as to the debtor and gave a priority as to all precedent creditors who had not fastened upon the property prior to the filing or taking possession under the mortgage (if there had been any such). We feel that in the desire to do equity the Circuit Court of Appeals for the Sixth Circuit has arrived at a proper result in an illogical manner.

It is true that in the Huxoll case it appears that all of the creditors extended credit after the giving of the mortgage, before it was filed, and without knowledge of its existence, but the general principles cannot be different in such a case than in the case where only part of the claims arose in such manner; and the rights of subsequent creditors to claim the invalidity of the mortgage cannot be destroyed simply because all other creditors (with the exception of the mortgagee) are in the same position. Judge Knappen concedes that the mortgage is absolutely void as to such subsequent creditors but claims that a proceeding must be had before the bankruptcy to fasten upon the property in behalf of such subsequent creditors to assert such invalidity. Whence arises this necessity, and is not the necessity of fastening upon the property at some time simply a matter of remedy and not of right? According to the opinion of Judge Knappen the only difference between the rights of precedent creditors and subsequent creditors to avoid a mortgage, is that the precedent creditor must fasten upon the property before the mortgage is filed or possession is taken under it, while subsequent creditors may fasten upon the property after the filing or after possession is taken under the mortgage, *but in any event before a petition in bankruptcy is filed.* Judge Knappen seems to lose sight of the basic idea of the Michigan decisions that a subsequent creditor is in exactly the same position as a precedent creditor *who has fastened upon the property before the filing or taking possession under the mortgage.* AN UNFILED CHATTEL MORTGAGE AS TO PRECEDENT CREDITORS BECOMES VALID AS TO THEM WHEN THE MORTGAGE IS FILED OR POSSESSION IS TAKEN UNDER IT. IN THE CASE OF SUBSEQUENT CREDITORS, HOWEVER, THE FILING OF THE MORTGAGE OR TAKING POSSESSION UNDER IT, GIVES NO VALIDITY TO IT AS AGAINST THE SUBSEQUENT CREDITORS. IT STILL REMAINS ABSOLUTELY VOID AS TO THEM.

Suppose in the Huxoll case there had been both "precedent" and "subsequent" creditors; that the mortgagee had asserted rights under his mortgage, and the trustee had in behalf of both classes of creditors resisted such asserted rights, would the learned Judges of the Court of Appeals have held such chattel mortgage valid as against both classes of creditors, because there had been no fastening on the property in behalf of any of them before bankruptcy? Certainly not. The Court of Appeals would have fixed the priorities in the "bankruptcy" case, just as the Supreme Court of Michigan did in the "assignment" cases.

## SUMMARY.

We think we are right when we say:

(1) That as to all creditors who extended credit while the mortgage was off the files and in ignorance of its contents, the chattel mortgage of the Pontiac Savings Bank was absolutely void.

(2) That such invalidity existed regardless of the fact that the mortgage was subsequently filed before any subsequent creditor had attempted to fasten on the property.

(3) That the filing of the petition in bankruptcy did not make that chattel mortgage valid as to the subsequent creditors if absolutely void before.

(4) If fastening upon the property or its proceeds was necessary in order to attack the mortgage in behalf of subsequent creditors, the filing of the petition in bankruutcy did not take away the right to fasten upon the property or its proceeds.

(5) If the lien on the chattel mortgage upon the property or its proceeds was invalid as to subsequent creditors, it was invalid as to the trustee in bankruptcy as representative of such subsequent creditors.

(6) That a judgment creditor (whose claim arose on a subsequent debt) might have had an execution returned unsatisfied and then filed a judgment creditors' bill in equity to reach the proceeds of such unfiled chattel mortgage invalid as to him.

(7) That the necessity of taking a judgment and having execution returned unsatisfied arises only from the doctrine that before recourse can be had to equity all legal remedies must be exhausted.

(8) That the adjudication in bankruptcy of a debtor passes to his trustee all property which could be reached by an execution, hence the necessity of going through the form of taking judgment and having the execution returned unsatisfied is unnecessary, to enable a trustee in bankruptcy to assert the right of such a subsequent creditor who could have (but for the bankruptcy) obtained a judgment with execution returned unsatisfied and then asserted the invalidity of such mortgage.

(9) The bankruptcy law passed to the trustee in bankruptcy the title to all property of the bankrupt, free and clear of all liens void as to creditors.

(10) The adjudication in bankruptcy of Coates passed title to the trustee of all property of Coates or the proceeds thereof held by any person by conveyances or transfers void as to creditors, or some of them, and the trustee could assert such invalidity of such mortgage, as representative of such creditors as against whose rights such mortgage is void.

(11) That the requirement that the creditor must fasten upon the property before he can attack a mortgage absolutely void as to him, means no more in the case of an instrument void as to failure to file, than it does in thecase of a mortgage void for actual fraud. A creditor cannot attack the latter except by some attempt to fasten upon the property or its proceeds, but there is apparently no doubt of the right of a trustee to file a bill to set aside such actually void transaction.

(12) The expression "to fasten upon the property" means no more than that a creditor injured by a conveyance, actually or constructively fraudulent, cannot sue or bring proceedings against the fraudulent grantee or mortgagee direct, but must assert the same through his claim against the debtor.

(13) If fastening upon the property or its proceeds is necessary to permit the trustee as representing subsequent creditors, to attack the invalidity of the chattel mortgage in this case, the filing of the bill of complaint (the necessity for creditors obtaining judgments and having executions returned

unsatisfied have ceased to exist) created such an equitable lien or fastening as would permit the trustee to assert the invalidity of the chattel mortgage as to the subsequent creditors represented by such trustee.

We respectfully ask that the decree of the Circuit Court of appeals be reversed and that of the District Court be affirmed.

Respectfully submitted,

BERNARD B. SELLING,

*Solicitor for Complainant and Appellant.*

SELLING & BRAND,

*Of Counsel.*

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# SUPREME COURT OF THE UNITED STATES.

DETROIT TRUST COMPANY,
Trustee in Bankruptcy of the
Estate of CHARLES COATES,
Bankrupt,
Complainant and Appellant,

vs.

PONTIAC SAVINGS BANK and
CHARLES COATES,
Defendants and Appellees.

October Term, 1914.
No. 173.

## BRIEF FOR DEFENDANT, PONTIAC SAVINGS BANK.

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The statement of the case contained in the brief of Counsel for Appellant (pp. 1-3) is in the main correct, so far as bearing upon the two questions, set forth on page 3 of Counsel's brief, which were raised by the Defendant and Appellee, Pontiac Savings Bank, in the Court of Appeals, are concerned, but there was a third question raised by the Appellee in the Court of Appeals, viz:

> That the payment by Coates to the Bank on January 10, 1903, of his indebtedness was entirely voluntary on his part, and not because of any steps taken by the Bank to enforce the chattel mortgage, or because of any coercion whatever towards him on the part of the Bank, by means of the chattel mortgage or otherwise, and therefore none of the creditors whom the Trustee claims to represent in this suit, could have recovered from the Bank the amount of their respective claims.

This question was raised and argued by Counsel for the Appellee in the Court of Appeals, but that Court found it unnecessary to pass upon this question because it decided

the case in favor of the Appellee on the second question stated in Counsel's brief (196 Fed., 29). We, however, feel that the position of the Appellee on this question should be put before this Court, and it is, therefore. necessary to state certain facts additional to those stated in the Brief of Counsel for Appellee:

On the day after Thanksgiving Day, 1902, Tidball & Parmeter, co-partners, commenced negotiations with Coates to purchase his stock of hardware, fixtures, etc. (R., pp. 32-3, 35-6). These negotiations continued until the latter part of December, when the basis of a sale was agreed upon, and a written agreement was executed, providing that the stock was to be bought at 90 cents on the dollar of an inventory to be taken (R., pp. 33, 36). Tidball & Parmeter commenced taking the inventory on January 5, 1903, and completed it on January 10 (R., pp. 33, 36). They did not know of the chattel mortgage held by the Bank, which had been filed with the City Clerk on September 9, 1902, until the afternoon of January 10, when Coates informed Mr. Tidball of it (R., p. 34). Tidball went to the bank and inquired as to the amount of the mortgage, and was informed as to its amount (R., p. 34). He then went back and finished the inventory (R., p. 34). On the evening of that same day, January 10, which was Saturday, *because of the wish of Coates to pay his indebtedness to the Bank* (R., p. 34-5), Coates and Tidball (it does not appear whether Parmeter also was present), went to the Bank, Cramer Smith, cashier of the Bank, and Frank H. Hale, who at that time held no official position in the Bank, but who had become connected with it in November, 1902, and who is now its president, being present representing the Bank (R., pp. 38-41, 42-6), and Tidball delivered to Coates certificates of deposit and drafts for $5,187.36, the purchase price according to the inventory which had been taken, which was deposited to the credit of Coates' account in the Bank (R., pp. 33-36, 38-41, 42, 46). Coates gave to the Bank a check for $2,120.50 n paymenit of the balance due on his indebtedness, and the Bank gave to Tidball & Parmeter a receipt (R., pp. 33-36, 38-41, 42, 46), signed by Hale in the name of D. H. Power, president of the Bank, although Power was not present (R., pp. 39-40, 44-6), a copy of which is set forth on page 3 of the brief of Counsel for Appellee.

Hale made out a deposit slip for the $5,187.36 (R., pp. 42-6), gave Coates credit for the deposit (R., pp. 42-6), then got Coates' note and computed the amount due on it, $2,120.50, and Coates then gave to Hale the check drawn

upon his account for that amount in payment of his indebtedness to the Bank (R., pp. 37-41, 42-6). On Monday, January 12th, Cramer Smith, as cashier of the Bank, formally discharged of record the chattel mortgage (R., pp. 4-5, 9, 45-6), and Coates gave to Tidball & Parmeter a bill of sale of the stock of hardware, fixtures, etc. (R., pp. 5, 33-4). Coates by checks withdrew from the Bank within a short time after this deposit of January 10th the balance standing to his credit, his account being closed on January 21st (R., pp. 38-40, 43-6).

It was Coates' wish, not that of Tidball & Parmeter, to pay the indebtedness to the bank. Tidball testified:

> "Q. What, if any, arrangement did you make with Mr. Coates as to paying this money to the Pontiac Savings Bank?
>
> A. Made no arrangement with Mr. Coates.
>
> Q. Did you tell him you were going over to the Pontiac Savings Bank to pay it?
>
> A. *It was his wish.*" (R., p. 34.)

Tidball & Parmeter paid the purchase price to Coates, not to the bank. As to this Tidball testified as follows:

> "Q. Did you pay the full amount for the stock into the bank or to Mr. Coates?
>
> A. *To Mr. Coates in the presence of one of the bank officers.*" (R., p. 35.)

We call attention to this particularly, because in the answer of the Bank (Par. 16, there being also a similar statement or admission in Par. 10), the following statement or admission, upon which counsel for the Appellant seized in the District Court and attempted to make much of, was inadvertently made: "That said Tidball & Parmeter voluntarily paid the balance of said chattel mortgage, to wit: $2,120.50, to this defendant January 10, 1903." (R., p. 9-10). The receipt given by the Bank to Tidball & Parmeter states that the payment was "received of Charles Coates through Tidball & Parmeter" (R., p. 33). This is the admission to which Appellant's counsel calls attention on page 2 of his brief, but it is clear that the admission was inadvertently made.

Tidball & Parmeter did not pay the balance due the Bank, $2,120.50, which was secured by the chattel mortgage, but they paid to Coates the full purchase price for the property, and Coates deposited the drafts and certificates thus turned over to him to the credit of his account in the Bank, and then gave to the Bank a check on his account in payment of his indebtedness. Those are the real facts.

The first question raised by the defendant, Pontiac Savings Bank, in the Court of Appeals, viz: that as to the jurisdiction of the District Court, was ruled against Appellee by that Court, and we shall not discuss it here. The two questions open for argument are, therefore, as follows:

(1) That the Trustee was not vested with authority by Sec. 70-e of the Bankruptcy Act of 1898 to maintain this suit in behalf of the creditors who claim to have sold goods and extended credit to Coates during the time between the making and the filing of the chattel mortgage, because none of these creditors had any lien, and had taken no steps to acquire any, upon the property covered by the chattel mortgage, or upon the money paid to the Bank, at the time of the commencement of the bankruptcy proceedings, or at the time of the adjudication of bankruptcy.

(2) That the payment by Coates to the Bank on January 10, 1903, of his indebtedness was entirely voluntary on his part, and not because of any steps taken by the Bank to enforce the chattel mortgage, or because of any coercion whatever towards him on the part of the Bank by means of the chattel mortgage or otherwise, and therefore none of the creditors whom the Trustee claims to represent in this suit could have recovered from the Bank the amount of their respective claims.

---

*The Trustee was not vested with authority by Sec. 70-e of the Bankruptcy Act of 1898 to maintain this suit in behalf of the creditors who claim to have sold goods and extended credit to Coates during the time between the making and the filing of the chattel mortgage, because none of these creditors had any lien, and had taken no steps to acquire any, upon the property covered by the chattel mortgage, or upon the money paid to the Bank, at the time of the commencement of the bankruptcy proceedings, or at the time of the adjudication of bankruptcy.*

The rule is settled in Michigan that a chattel mortgage not immediately filed after it is given (unless possession is immediately taken under it) is void as to the creditors whose claims accrued between the time of its making and of its filing.

*Fearey vs. Cummings,* 41 Mich., 376;
*Waite vs. Matthews,* 50 Mich., 392;
*Crippen vs. Fletcher,* 56 Mich., 386;
*Root vs. Harl,* 62 Mich., 420;
*Krolik vs. Root,* 63 Mich., 562;
*Johnson vs. Stellwagen,* 67 Mich., 10;
*Brown vs. Brabb,* 67 Mich., 17;
*Cutler vs. Steele,* 85 Mich., 627;
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*Ramsdell vs. Power Co.,* 103 Mich., 89;
*Vining vs. Millar,* 116 Mich., 144;
*Baker vs. Parkhurst,* 119 Mich., 542;
*People vs. Burns,* 161 Mich., 169.

Other Michigan cases to the same effect could be cited, but the foregoing show that the question is absolutely settled in that State, and we shall, therefore, make no attempt to question the soundness of the rule. Our position is that while the chattel mortgage in question may have been void as to the creditors of Coates, whom the Trustee claims to represent in this suit, who claim to have sold goods and extended credit to Coates between the time of the making and the filing of the chattel mortgage, assuming that these creditors actually did sell goods and extend credit to Coates during that period, still, as none of these creditors had a *lien* upon the property covered by the mortgage, or upon the money paid to the Bank, and had taken no steps to acquire any, at the time of the payment on January 10, 1903, or at the time of the commencement of the involuntary bankruptcy proceedings on February 16, 1903, or at the time of the adjudication of bankruptcy on March 6, 1903, the trustee cannot maintain this suit under Sec. 70-e of the Bankruptcy Act to avoid the chattel mortgage, or to recover the amount of the claims of such creditors from the Bank. *None of these creditors were at those times in a position to avoid the chattel mortgage, or to recover from the Bank the amount of their claims, and certainly Coates, the bankrupt, could not have recovered from the Bank at those times.*

In the Sixth Circuit, the rule was firmly established (prior to the amendment of 1910) that a trustee in bankruptcy took the bankrupt's assets in precisely the same condition as that in which they were held by the bankrupt, and that the inchoate equity of creditors who had not at the time of the adjudication of bankruptcy secured a *lien* by some judicial proceeding or otherwise could not be

worked out in their behalf by the trustee in the bankruptcy proceedings; *that the term "creditor" in Sec. 70e means a creditor who has in some way secured a lien.*

*York Mfg. Co. vs. Cassell,* 201 U. S., 344;
*In re Doran,* 154 Fed., 467;
*Crucible Steel Co. vs. Holt,* 174 Fed., 127; 224 U. S., 262;
*Foerstner vs. Savings & Trust Co.,* 186 Fed., 1;
*In re Huxoll,* 193 Fed., 851.

In *York Mfg. Co. vs. Cassell, supra,* this Court, overruling the decision of the Court of Appeals for the Sixth Circuit (135 Fed., 52), held that a trustee in bankruptcy is vested with no better right or title to property than the bankrupt had when the trustee's title accrued, and that where, as in the State of Ohio, a conditional sale contract was good between the parties themselves, although not filed, the vendor of machinery, sold and delivered under such a contract, payment for which had not been made, might remove the same as against all creditors of the bankrupt *who had not fastened upon it by some specific lien.* The Court of Appeals had held (135 Fed., 52) that the rights of creditors, although they might have obtained no specific lien, might be worked out in the bankruptcy proceedings, but this holding was reversed by this Court. This Court said in that case:

> "We are of opinion that it (the adjudication) did not operate as a *lien* upon the machinery as against the York Manufacturing Company, the vendor thereof. *Under the provisions of the Bankrupt Act the trustee in bankruptcy is vested with no better right or title to the bankrupt's property than belonged to the bankrupt at the time when the trustee's title accrued.* At that time the right, as between the bankrupt and the York Manufacturing Company, was in the latter company to take the machinery on account of default in the payment therefor. *The trustee under such circumstances stands simply in the shoes of the bankrupt and as between them he has no greater right than the bankrupt.* * * * The law of Ohio says the conditional sale contract was good between the parties, although not filed. In such a case the trustee in bankruptcy takes only the rights of the bankrupt, *where there are no specific liens,* as already stated."

It will be noted that, in the language above quoted, this Court stated that the conditional sale contract in that case was good between the parties, under the law of Ohio.

although not filed. In Michigan, also, *the chattel mortgage in question was good between the parties, although not filed.*

*Lyle vs. Palmer*, 42 Mich., 314.

When the question next came before the Court of Appeals in the case of *In re Doran, supra,* that Court fell into line with the decision of this Court in the case of *York Mfg. Co. vs. Cassell, supra,* and in a case involving the rights of creditors *who had extended credit while a chattel mortgage remained unfiled*—precisely the same situation claimed to exist in the case at bar—held that the rights of such creditors, who had not obtained any *specific lien* upon the property, could not be worked out in the bankruptcy proceedings. That Court said in that case:

> "In the case of *York Mfg. Co. vs. Cassell*, 201 U. S., 344, 26 Sup. Ct. 481, 50 L. Ed. 782, *the Supreme Court held that we were in error in supposing that the inchoate equity of creditors could be vindicated by the trustee in the court of bankruptcy, and reversed the judgment.* That case is not precisely in point, because in the present case the mortgagee had recorded his mortgage before the petition in bankruptcy was filed, while in that case this had not been done. But the distinction is favorable to the appellant. The statutes of Ohio, where that case arose, and of Kentucky, are not identical, but so far as the principal question is concerned they are not dissimilar. *If in that case the equity of the creditors was lost by their failure to fasten it before the bankruptcy proceedings, so here they must fail for a like reason,* and because the mortgagee had filed his mortgage and made himself secure before the petition in bankruptcy was filed."

The question next came before the Court of Appeals in the case of *Crucible Steel Co. vs. Holt, supra,* and that Court again held, on the authority of *York Mfg. Co. vs. Cassell, supra,* and *In re Doran, supra,* that the rights of creditors *who extended credit while a conditional sale contract* (treated by that Court as a chattel mortgage) *remained unfiled,* could not be worked out in the bankruptcy proceedings. We call this Court's particular attention to the following statement of the facts relative to the creditors whom the trustee in that case represented (p. 128):

> *"Certain parties became creditors of the bankrupt after the date of the contract, but before the filing of the petition in bankruptcy; and it is these parties in whose behalf the trustee makes this contest*

*against the claim of the vendors in the contract of sale of the title and for the possession of the goods."*

That case is thus seen to have been precisely like the case at bar, where the Trustee claims to represent creditors who claim to have extended credit to Coates between the date of the giving and the filing of the chattel mortgage. In that case, that Court said:

"In the case of *York Mfg. Co. vs. Cassell,* 201 U. S., 344, 26 Sup. Ct. 481, 50 L. Ed. 782, the Supreme Court, reversing a judgment of this court, held that the trustee in bankruptcy takes the assets in precisely the same condition and with the like title as that by which they were held by the bankrupt, and further, *that the inchoate equity of creditors who had not then secured a lien by some judicial proceeding could not be worked out in their behalf by the trustee in the bankruptcy proceedings.* That decision necessarily negatives the application to such a case of the provision of Act July 1, 1898, c. 541, No. 67a, 30 Stat. 564 (U. S. Comp. St. 1901, p. 3449), 'that claims which for want of record, or for other reasons, could not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate'; and the further provision of section 67b, that 'whenever a creditor is prevented from enforcing his rights as against a lien created or attempted to be created by his debtor who afterwards becomes a bankrupt, the trustee of the estate of such bankrupt shall be subrogated to and may enforce such rights of such creditor for the benefit of the estate.' Those provisions were not referred to in the opinion of the court, and, of course, their meaning and scope were not defined further than is done by the necessary implication from the decision; but it cannot be supposed they were overlooked. We note that in *Thomas vs. Taggart,* 209 U. S., 385, at page 389, 28 Sup. Ct. 519, at page 520, 52 L. Ed. 845, Mr. Justice Day said: 'The rule is generally recognized that, if the title to property claimed is good as against the bankrupt and his creditors at the time the trustee's title accrued, the title does not pass, and the property should be restored to its true owner.' But when he says, 'and his creditors,' *we must suppose he means creditors who have secured a lien;* for he cites *York Mfg. Co. vs. Cassell.*

"Accepting, then, the decision in the case of *York Mfg. Co. vs. Cassell* as authoritative, what were the

respective rights of the Crucible Steel Company and the bankrupt in the goods in question at the date of the filing of the petition? As between them the mortgage was valid, though not recorded. *No creditor had fastened any lien upon them, although several of them were in a condition, and had a right, to do so. These two facts were regarded as decisive by the Supreme Court in the case referred to, and they seem equally decisive here.* In the case entitled *In re Doran,* 154 Fed. 467, 83 C. C. A. 265, we discussed at some length the meaning and effect of mortgages, and as to whether general creditors are protected thereby; but we felt constrained to abide by the opinion of the Supreme Court in *York Mfg. Co. vs. Cassell* as settling the grounds upon which cases of this sort must be determined. In the *Doran case* the chattel mortgage had been filed before the filing of the petition. In the present case it had not. But we cannot perceive that the difference is important. The mortgage was valid as between the mortgagor and the mortgagee, whether recorded or not, *and there is no express definition by the statute which extends the meaning of the word 'creditors,' so as to include general creditors having no lien.*"

That case (*Holt, Trustee, vs. Crucible Steel Co.*), was appealed to this Court, the opinion of this Court being reported in 224 U. S., 262. This Court, in affirming the decision of the Court of Appeals, held that the effect to be given to the chattel mortgage must be determined by the recording law of Kentucky, and, after reviewing the Kentucky decisions on that question, held that under those decisions it was necessary for the subsequent creditors, without notice, to have acquired a lien upon the property covered by the mortgage prior to the bankruptcy proceedings in order for the Trustee to contest its validity in their behalf.

The question was again considered by the Court of Appeals for the Sixth Circuit in the case of *Foerstner vs. Savings & Trust Co., supra,* which involved the validity of an unrecorded real estate mortgage under the laws of Ohio. That Court again reaffirmed its understanding of the effect of the decision in *York Mfg. Co. vs. Cassell, supra,* in the following language:

> "But this is a case of a real estate mortgage, while the case of *York Mfg. Co. vs. Cassell* involved the validity of liens upon personal property, and there is an important difference in the provisions of the

statutes relating to mortgages of real estate and those relating to mortgages of personal property. Under those statutes a chattel mortgage conveys the title to the mortgagee. In the case of a conditional sale, the vendor has also the legal title. When the bankruptcy of the mortgagor, or of the vendee of the conditional sale, takes place, the trustee takes the property subject to the mortgage, or, if there has been a conditional sale, subject to the right of the vendor to reclaim it, if the condition be unperformed. This was the situation which existed in the case of *York Mfg. Co. vs. Cassell.* This confessedly would be the situation in such cases, when not affected by the provisions of the bankrupt act. But the further question arose concerning the status of general creditors of the mortgagor; that is to say, those who, *though they had a right to acquire a lien, had not in fact obtained any before the property came into the hands of the trustee in bankruptcy.* And the court employed the oft-repeated language that the trustee stands in the shoes of the bankrupt, and acquired the property in the same plight that the bankrupt held it at the time of bankruptcy. The court did not in terms refer to *those provisions of the bankruptcy act which create other rights and duties than those which had belonged to the bankrupt. It must be presumed, nevertheless, that the court did not overlook those provisions:* for we find that in a subsequent case (*Security Warehousing Co. vs. Hand*, 206 U. S., 424, 425, 27 Sup. Ct. 720, 51 L. Ed. 1117), Mr. Justice Peckham, who wrote the opinion in the York Mfg. Co. case, goes into an explanation, which imports *that the court had not in the former case failed to regard those exceptions to the general rule just mentioned.*"

*In re Huxoll, supra,* is on all fours with the case at bar with respect to this question, and was held by the Court of Appeals to be decisive of this case. That case, which arose in Michigan, involved the rights in bankruptcy proceedings of creditors who became such between the giving and filing of a chattel mortgage. None of those creditors, prior to the bankruptcy proceedings, *had by a proceeding fastened any lien upon the property covered by the mortgage.* The Court of Appeals held that if the superior rights of such creditors, under the Michigan statute and the Michigan decisions construing it, amounted to a *mere right to fasten a lien,* as distinguished from *an actually established lien,* they could not be given effect under the Bank-

upt Act, for the reason that an adjudication of bankuptcy does not operate as an attachment of the property, iting *York Mfg. Co. vs. Cassell* and *Crucible Steel Co. vs. Holt.* The Court then proceeded to review the Michigan decisions upon the question whether the rights of such reditors amounted to a mere right to fasten a lien, or to n actually established lien. It said:

"We are thus brought to the question whether the Michigan statute creates *of itself* a lien upon the mortgaged property prior to the lien of the mortgage, requiring no proceedings of any kind to its fastening; or whether the statute merely *creates a right* of priority without actual lien, requiring a proceeding of some kind to the fastening of a lien. The decisions which seem to lend the most support to the view of an actual lien are *Root vs. Harl,* 62 Mich., 420, and *Kennedy vs. Dawson,* 96 Mich., 79, both of which arose under general assignment for the benefit of creditors. *Root vs. Harl* was cited by the district judge in support of the order of distribution made. In that case, under a bill for the appointment of a receiver of property conveyed under general assignment for the benefit of creditors, a mortgage not actually fraudulent had been declared void as to creditors whose debts were created between the giving and filing of the mortgage. In applying the rule of distribution, the doctrine was asserted that:

'Any creditors have a right to avoid any unrecorded mortgage who have during its absence from the record done anything material which they may be fairly considered to have done on the basis of its non-existence.'

"The question of actually existing lien was not in terms discussed. In *Kennedy vs. Dawson,* 96 Mich., 79, in which replevin was brought by the mortgagee against the general assignee of the mortgagor, the Court, in setting aside an objection that the rights of the parties could not be worked out in that proceeding, said:

'The assignee is the representative of all the creditors, including those whose rights were injuriously affected by withholding the mortgage from record. As a representative of such creditors, he had the right to retain possession for their protection. * * * The *deed of assignment* transferred to the defendant (assignee) the general title of the goods, subject to the plaintiff's (Mortgagee's) lien, *and, in addition to this, a lien on the property as a repre-*

*sentative of the special class of creditors, which lien was entitled to precedence over that of the plaintiff (mortgagee).'*

"In *Dempsey vs. Pforzheimer*, 86 Mich., 642, it was said:

'It would seem to be settled in *Root vs. Harl*, 62 Mich., 420 (29 N. W. 29), that, when an assignment is made by a debtor for the benefit of creditors, such creditors as are the defendants in this case, can, upon the equity side of the court attack the unrecorded mortgage and obtain a preference over it, although they have no lien whatever upon the debtor's property; and that they are not "general creditors" in such a sense that they cannot attack the mortgage without first obtaining a lien by legal process or otherwise.'

"In *Krolik vs. Root*, 63 Mich., 562, where creditors who became such during the life of an unrecorded mortgage were seeking, by creditor's bill, to avoid the mortgage, as well as the rights of purchases of the mortgaged property, it was said:

'The defendants' holding an unrecorded mortgage did not give the complainants a lien upon the goods.'

"Taking these decisions together, we are disposed to the view that they mean no more than that *the assignee is by the assignment given a lien upon the property*, which lien did not before exist. If this is all they mean, then the superior equity cannot be enforced in bankruptcy, for, as decided in *York Mfg. Co. vs. Cassell*, the bankruptcy does not operate as an attachment or give to the trustee a lien not before existing. *The fact that an assignee for the benefit of creditors is by the assignment given a lien does not of itself give such a lien to the trustee in bankruptcy.* See *Cincinnati Equipment Co. vs. Degnan* (C. C. A. 6), 184 Fed., 834.

"It is true that the case before us differs from the cases of *York Mfg. Co. vs. Cassell*, *In re Doran*, and *Crucible Steel Co. vs. Holt*, in this: That by virtue of the statutes in those cases only such subsequent creditors as took proceedings for fastening a lien before the mortgage instrument was filed could receive protection; while here the proceeding could be taken at any time after the filing of the mortgage. But this difference is not, in our opinion, important, for in *York Mfg. Co. vs. Cassell* and *Crucible Steel Co. vs. Holt*, the mortgage instruments involved had not been filed when bankruptcy occurred, *and so the right of subsequent creditors to*

*fasten upon the property existed there as here up to the very moment of bankruptcy.* As said in *Crucible Steel Co. vs. Holt,* 174 Fed., 129,

'No creditor has fastened any lien upon them (the goods), although several of them were in a condition, and had the right, to do so.'

"We are constrained to conclude that the subsequent creditors we are considering had no actual lien upon the mortgaged property at the time bankruptcy occurred."

The Circuit Judge (Judge Knappen) who rendered the opinion in that case is from Michigan, and was, therefore, better able, perhaps, to determine the law of that State than he would have been if he were from some other state. In the case at bar, two of the Circuit Judges who sat in the Court of Appeals (Judges Knappen and Denison) were from Michigan.

The Court in that case recognized that a lien for the purpose of contesting such a mortgage might be acquired in several ways, but held that it must actually be acquired before the intervention of bankruptcy proceedings in order for the trustee to contest its validity in behalf of creditors who would have been entitled to contest it if bankruptcy had not intervened.

Appellant's counsel on page 9 of his brief has stated that such a mortgage may be attacked in four different ways, and in the course of his brief has laid particular stress upon the right of an assignee for the benefit of creditors under the Michigan statute in an equitable proceeding to attack it. This precise question was considered by Judge Knappen in the case under discussion (In re Huxoll), as appears from the portion of the decision above quoted, and he held that the Michigan statute relative to assignments for the benefit of creditors gave a lien upon the property, which entitled such assignee to attack it in behalf of such creditors. Therefore, it is idle for appellant's counsel to argue that because an assignee for the benefit of creditors under the Michigan statute has the right to attack such a mortgage, a trustee in bankruptcy has that right. The distinction is, the Michigan statute gives to such an assignee a lien, while under the case of *York Mfg. Co. vs. Cassell* no such lien is given to the trustee in bankruptcy. We insist that that case is decisive of this case, as was held by the Court of Appeals in this case (196 Fed., 29).

See also:

*Toof vs. City Nat'l. Bank,* 206 Fed., 250.
*Gage Lumber Co. vs. McEldowney,* 207 Fed., 255.

In Ohio, under statutes almost word for word the same as the statutes of Michigan, the courts hold that a chattel mortgage not forthwith filed *becomes a valid lien from the date on which it is filed,* even as against creditors of the mortgagor whose claims accrued while it was withheld from the record, in the absence of fraud.

*In Re Schmitt,* 109 Fed., 267.
*In Re Shirley,* 112 Fed., 301.

In that case (s. c. under different titles), a chattel mortgage was executed to secure an existing indebtedness, but was withheld from the files for three months and was then filed. During the interval the mortgagor incurred certain indebtedness by the purchase of goods from various parties. None of these creditors caused any examination to be made of the public record of mortgages before selling the goods and extending credit, or had any actual knowledge at the time whether such record disclosed mortgages on file or not. In passing, we may say that this fact is also true in the case at bar. In that case, the mortgagor was later adjudicated a bankrupt. Held, *that the mortgage became a valid lien from the date it was filed.*

This precise question, viz., does a chattel mortgage not forthwith filed become a valid lien from the date when it is filed? has never been passed upon by the Supreme Court of Michigan. However, in the opinion of the Court in *Waite vs. Mathews,* 50 Mich., 392, there are certain expressions of opinion which are in line with the decisions of the Ohio courts. In that case the Court said:

> *"There seems to be no good reason why a chattel mortgage which is otherwise honest should not become operative on delivery of the goods and take effect from such delivery. If a party could make a new mortgage and immediate delivery which would be valid, no good reason is manifest why one already signed, but needing delivery of the property to complete it, should not be made complete by such delivery where no one has obtained rights or been prejudiced by the delay—filing in the proper office is equivalent for saving purposes to actual delivery of property.* We do not mean to decide that creditors who have been actually damnified by reliance on the title being clear, to postpone action, may not be protected. But, as already suggested, *if a new mortgage would be valid against them they cannot be damnified by the completion of an inchoate one."*

The decision of the Michigan Supreme Court in the case of *Johnson vs. Stellwagen,* 67 Mich., 10, is also, in principle,

in line with the decisions of the Ohio Courts. In that case, the old mortgage was destroyed and a new one executed, but dated as of the date of the old mortgage, which new mortgage was filed. The mortgagor incurred certain debts during the interval between the execution of the unfiled chattel mortgage and the making and filing of the new mortgage. Later, the mortgagee took possession of the property. Held, the failure to file the old mortgage did not prevent the mortgagee from taking a new mortgage, and that the new mortgage was not invalidated by antedating it as of the date of the old mortgage. In the case at bar no new mortgage was made. But it seems absurd to say that in that case the mortgage was valid, and in this case it is invalid. If the Pontiac Savings Bank had taken a new mortgage on September 9th, when it filed the old mortgage, and had filed such new mortgage instead of the old one, what real difference in principle would there be between that situation and the situation in the case at bar? We submit, there is no difference in principle between the two cases.

If the chattel mortgage in question became valid on its filing on September 9th, 1902, then there is no question but that the bill in the case at bar cannot be maintained, because the mortgage remained on file from that date, September 9th to January 12th, when it was formally discharged, over four months, *during which period not one of the creditors represented by the trustee took any proceedings whatever against Coates or in any way questioned the mortgage.*

In the lower Courts (District Court and Court of Appeals), counsel for the appellant argued that the decision in the case of *York Mfg. Co. vs. Cassell,* supra, which arose in Ohio, was based wholly upon the decisions of the Ohio courts with respect to the rights of creditors who have not fastened a lien upon property covered or taken by chattel mortgage, and that the decisions of Court of Appeals in the case of *In Re Doran,* supra, and *Crucible Steel Co. vs. Holt,* supra, both of which arose in Kentucky, were based entirely upon the construction placed by the Kentucky courts upon the Kentucky statutes relating to chattel mortgages. The case of *Foerstner vs. Savings & Trust Co.,* supra, which arose in Ohio, had not been decided at the time of the argument in the District Court in the case at bar. The decisions as to the law in Ohio and Kentucky respectively unquestionably entered into the respective holdings in those cases, but those cases are authority for the proposition that the trustee in bankruptcy takes the prop-

erty in precisely the same condition in which it was held by the bankrupt, and the decisions of the Court of Appeals in the last three case above mentioned is that a trustee in bankruptcy has no authority to represent creditors who have not secured liens; that a creditor, within the provisions of the Bankruptcy Act, in whose behalf the trustee may act, means a creditor who has secured a lien, and that if no creditor has secured a lien, then the trustee cannot act. *The test of the right of the trustee to act is whether, at the date of the adjudication, any creditor was in a position, through having secured a lien, to question the title to property good as against the bankrupt.* Judge Severens in the case of *Crucible Steel Co. vs. Holt*, supra, quoted the following language from the opinion of Mr. Justice Day in *Thomas vs. Taggart*, 209 U. S., 385:

> "The rule is generally recognized that, if the title to property claimed is good as against the bankrupt *and his creditors* at the time the trustee's title accrued, the title does not pass and the property should be restored to its true owner."

Judge Severens said with respect to this language:

> "But when he (Mr. Justice Day) says *'and his creditors,'* we must suppose he means *creditors who have secured a lien;* for he cites *York Mfg. Co. vs. Cassell.*"

We also call particular attention to the following language of Judge Severens in the case of *Foerstner vs. Savings & Trust Co.*, supra:

> "The Court did not in terms refer to *those provisions of the Bankruptcy Act which create other rights and duties than those which had belonged to the bankrupt. It must be presumed, nevertheless, that the Court did not overlook those provisions;* for we find that in a subsequent case (*Security Warehousing Co. vs. Hand*, 206 U. S., 424, 425; 27 Sup. Ct., 720, 51 L. Ed., 1117), Mr. Justice Peckham, who wrote the opinion in the York Mfg. Co. case, goes into an explanation, which imports that the Court had not in the former case failed to regard those exceptions to the general rule just mentioned."

This language, we submit, clearly shows the understanding of the Court of Appeals for the Sixth Circuit to be that a creditor, within the provisions of the Bankruptcy Act, in whose behalf the trustee may act, means a creditor who has secured a lien. That this is the effect of the decision of this Court in *York Mfg. Co. vs. Cassell, supra*, and of the Court of Appeals in its decisions above cited and quoted

from, is clearly shown by the fact that Congress deemed it necessary to pass the amendment of June 25, 1910, to Sec. 47-a (2) of the Bankruptcy Act of 1898, in order to correct what it considered a defect in the Act. The language added by this amendment to that section is as follows:

> "And such trustees, as to all property in the custody or coming into the custody of the bankruptcy Court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also, *as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies and powers of a judgment creditor holding an execution duly returned unsatisfied.*"

The Senate Judiciary Committee in its report on this proposed amendment (Rep. No. 691, Sen. Jud. Com., 61st Cong., 2nd Ses.) said:

> "One of the most important decisions under the present law is *York Mfg. Co. vs. Cassell*, 201 U. S., 344, wherein it was held that property covered by an unrecorded instrument, which would have been void in the State Courts had the property been taken by an assignee or receiver or levied upon by attachment or execution, *was not void where possession was taken by a receiver or trustee in bankruptcy, the Supreme Court holding that the trustee stood precisely in the bankrupt's shoes with regard to the unrecorded instrument, even though in the State courts had the seizure been made by an assignee in insolvency or receiver, or by the sheriff under execution or attachment, the unrecorded lien would have been void as against creditors.* By this ruling the trustee in bankruptcy is held to be vested solely with the bankrupt's own title, except as to property fraudulently transferred and as to property which (within four months before the bankruptcy) has been seized by a creditor by legal process or voluntarily transferred to him by way of a preference. The trustee, under the present law, does not (except as to property fraudulently transferred) take the rights that a creditor under State law might have *acquired* but only such as *some creditor had actually acquired by levy of process*, and then only in the event that such levy has occurred within four months before the bankruptcy and the lien of the levy (otherwise void under Sec. 47-f) been preserved for the benefit of the trustee by order of court. *In this way a distinct advantage is given in bankruptcy*

*to the holders of unrecorded liens. The creditors' hands, meanwhile, are tied from making any levy,* because the separate rights of the creditors have become vested in the trustee for all; besides which as to property already in the custody of the bankruptcy court, of course individual creditors would be in contempt of court should they levy thereon. Thus the evil of secret liens has continued. *It is this evil and the injustice worked upon creditors who rely upon the debtors apparent ownership against which the bankruptcy law has set its face. The proposed amendment, whilst correcting the defect named,* at the same time carefully guards the rights of all parties."

See

*3 Remington on Bankruptcy,* pp. 331-2.

The purpose and effect of this amendment has been before the courts in several cases, viz:

*In Re Hammond,* 188 Fed., 1020;
*In Re Bazemore,* 189 Fed., 236;
*In Re Williamsburg Knitting Mill,* 190 Fed., 871.

In the case of *In Re Hammond,* supra, the Court said:

"If it were not for the amendment of 1910, we would be referred for determination of the question before us to section 70 of the Bankruptcy Act, which read then, as now:

'The trustee of the estate of a bankrupt * * * shall * * * be vested by operation of law with the title of the bankrupt as of the date he was adjudicated a bankrupt.'

*And, following the authority of York vs. Cassell, it would transpire that none of the creditors of Hammond having reduced his claim to judgment, the decisions cited above from the Ohio authorities would have no application, and Fee could enforce his lien as if the bankruptcy petition had not been filed;* for, under the Ohio authorities, the mortgage was good between the parties, and by the language of the Bankruptcy Act just quoted, manifestly the trustee stood in the shoes of the bankrupt; *York vs. Cassell* being to the effect *that only creditors who have reduced their claims to judgment or who have levied by attachment may assert rights against the mortgagee of a mortgage void in the particulars referred to.*

But the Act of June 25, 1910, amending the bankruptcy law, adds to section 47, par. 'a', these words:

(The Court here quoted the amendment of 1910 above quoted by us):

'It seems that this language might have found a more appropriate place in section 70 of the Act; but, however that may be, it is plain that the two sections must now be construed together, and that the trustee can no longer be said to have the limited title of the bankrupt. Wherefore it need not be argued further that, if this mortgage had been made after the amendment, Fee would have had no lien against the trustee. And we think that the amendment effects the same result in this case, although the mortgage is prior in time.'"

In the case of *In re Bazemore, supra,* the Court said:

"Does the amendment to the Bankrupt Act (Act June 25, 1910, c. 412, 36 Stat., 838) vest in the trustee the right of a judgment creditor without notice to hold the property sold as against the conditional vendor?

* * * * * * * * * * *

Before the amendment to the Bankruptcy Act, the trustee's title as against a claim under an unrecorded conditional sale, though the State law required record, did not prevail (*Crucible Steel Co. vs. Holt,* 174 Fed., 127; 98 C. C. A., 101). *It was to obviate this, among other things, that* section 47, cl. 2, subd. 'a' of Act July 1, 1898; c. 541, 30 Stat. 557 (U. S. Comp. St. 1901, p. 3438), *was amended* by inserting the words 'And such trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings thereon' (statement of Representative Shirley to the House of Representatives, Congressional Record, Sixty-first Congress, 2d Session, pp. 2552-2554—36 Stat. 840), and to vest in the trustee the same right to attack secret unrecorded liens, where record was required by the State law, as was given to the judgment creditors and others under that law. It seems to me that the language of the amendment should be construed to effectuate this result if it fairly admits of such construction."

In the case of *In re Williamsburg Knitting Mill, supra,* the Court said:

*"The amended Act of June 25, 1910, was passed as a result of the decision in the York Manufacturing Co. case,* 201 U. S., 344; 26 Sup. Ct. 481, 50, L.

Ed., 782, supra, *and with a view of meeting the same,* as will be presently shown. The section as amended is as follows (The Court here quotes the amendment of 1910 above quoted by us):

The language used in this amendment is clear and comprehensive, and as viewed by the Court unequivocally gives to the bankruptcy proceeding the effect of a lien, as is contemplated by the *York case, supra,* and the same will suffice to give to those claiming rights by reason of the bankruptcy court proceedings, precedence over an unrecorded vendor's lien under the Virginia statute. The amendment does, in fact, give to the bankruptcy proceedings the force of a caveat to all the world, and in effect an attachment and injunction, and the same applies to cases as well of the attempted disposition of property after bankruptcy, as to those asserting title to or lien upon the bankrupt's estate arising out of transactions antedating the bankruptcy. *The effect of this change is unquestionably radical and far reaching, as regards the consequence of the institution of bankruptcy proceedings,* but it is what Congress had the right to do, and carries out what in the judgment of many should be the effect of such proceeding. It makes the date of the institution of the bankruptcy proceeding, the time as of which rights to, and claims against the estate, should be reckoned with and adjusted, and from and after which period no one creditor or claimant can secure or receive preference or advantage over another.

* * * * * * * * * * *

This view of the effect of this amendment is taken by Remington, an author of recognized authority on bankruptcy laws. In the recent edition of his work (volume 3, p. 331), the author says:

*'By the amendment of* 1910 to the Bankrupcy Act, section 47-a (2), *this rejected doctrine* that bankruptcy operates as an equitable levy as to property in the custody of the bankruptcy court, *has become the accepted doctrine.'*

Moreover, this author shows that Congress by the amendment in question *purposely sought to modify* the decision of *York Manufacturing Co. vs. Cassell, supra.* At page 331 of the same volume (3) the report of the Senate Judiciary Committee on the amendment of the Act is set out in full, stating in terms that *its object and purpose was to meet the decision in the York case,* and to adopt in lieu

thereof the views herein taken. *Collier on Bankruptcy* (8th Ed.), pp. 541, 542, refers to this amendment approvingly, and in effect takes the same view of the Act that Remington does, though he calls attention to the fact that more logically the amendment should have been to section 70 of the Bankrupt Act, instead of section 47."

The report of the Senate Judiciary Committee above quoted, the reference to the statement of Representative Shirley to the House of Representatives found in the language above quoted from the opinion in the case of *In re Bazemore,* the interpretation put upon the purpose of Congress in passing the amendment of 1910 in the language above quoted from the several cases wherein the amendment has been involved, and the clear and unmistakable meaning of the language itself, show that Congress itself understood and deemed it to be necessary, in view of the decision of this Court in *York Mfg. Co. vs. Cassell, supra,* and of the Court of Appeals in its decisions above cited and quoted from, to pass this amendment in order to vest the trustee with authority to attack transfers voidable under Sec. 70-e, where no creditor at the time of the adjudication of bankruptcy had secured a lien. As Congress so understood the effect of the holding in *York Mfg. Co. vs. Cassell,* and the other cases, and as those cases unquestionably bear out the understanding of Congress in this respect, it seems idle to argue that before the amendment the trustee was vested with authority to attack a transfer voidable under Sec. 70-e, where no creditor was in a position at the time of the adjudication of bankruptcy by reason of having secured a lien to attack the transfer. It was this very situation which Congress sought to remedy by the amendment. Of course, it goes without saying that the amendment of 1910 cannot help out the Trustee in the case at bar, and, indeed, Sec. 14 of the amendment expressly provides that the provisions of the amendatory act shall not apply to pending cases.

We might rest the argument right here, but we think that the Michigan decisions themselves establish that a creditor, in order to attack a chattel mortgage, must have secured a lien of some sort.

In *Fearey vs. Cummings,* 41 Mich., 383, the Court quotes approvingly the following language from *Thompson vs. Van Vechten,* 27 N. Y., 568:

> "The mortgage cannot be legally questioned until the creditor clothes himself with a judgment and execution or *with some legal process against his*

*property;* for creditors cannot interfere with the property of their debtor without process."

In *Fearey vs. Cummings* the Court said:

"Still no one as creditor at large can question the mortgage. *He can only do that by means of some process or proceedings against the property.*"

In *People's Savings Bank vs. Bates,* 120 U. S., 556, which arose in Michigan, and which involved the question of priority between two chattel mortgages, this Court said: Court said:

"Besides, as the Court below held, upon this branch of the case, the bank, in its capacity as a creditor at large, is not entitled to attack the prior mortgage as fraudulent upon the grounds just stated. This general proposition is conceded by counsel, the usual way, he admits, being for the creditor, who has no particular claim in the property, to acquire a specific interest therein through the levy of an attachment or execution. Hence, he says, that while it is often stated that conveyances of this sort are void as to creditors generally, they must put their claims in the form of a judgment or attachment before they are in a position to attack them—*the object of the attachment or execution being to bring the attacking party into privity with the property. And such seems to be the rule recognized by the Supreme Court of Michigan.* In *Fearey vs. Cummings,* 41 Mich., 376, 383, the Court, construing a somewhat similar statute, said: 'If the mortgage was made with the intent to hinder, delay or defraud creditors (Comp. L., § 4713), or, inasmuch as the possesion was not altered, if it was not put on file prior to plaintiffs becoming creditors, it was invalid as against them; the law being that those who become creditors whilst the mortgage is not filed are protected, and not merely those who obtain judgments or levy attachments before the filing. Still no one, as creditor at large, can question the mortgage. He can only do that by means of some process or proceeding against the property' (Sec. 4706). In that case the Court cites *Thompson vs. Van Vechten,* 27 N. Y., 568, 582, in which it was held, in reference to a somewhat similar statute, that 'the mortgage cannot be legally questioned until the creditor clothes himself with a judgment and execution, or with some legal process against his property; for creditors cannot interfere with the property of their debtor without process.'"

In *Root vs. Potter,* 59 Mich., 504, the Court said:

> "It has always been held in this State that general creditors, *having no lien or judgment on the debtor's property,* cannot attack conveyances or other dealings for fraud."

The case of *Krolik vs. Root,* 63 Mich. 562, is directly in point in the case at bar on this question. In that case a chattel mortgage had been withheld from record for a period of time, during which certain creditors of the mortgagor had sold him goods and extended him credit. The mortgagee under the chattel mortgage purchased the interest of a mortgagee under a prior mortgage, and took possession of the property. The mortgagor then gave to the mortgagee who was in possession a second mortgage upon the property, which was duly filed, and the mortgagee executed to the wife of the mortgagor a bill of sale of the property. The creditors who had sold goods and extended credit to the mortgagor during the time the mortgage was withheld from record recovered judgment against him upon their claims, executions were issued thereon and returned unsatisfied, and they then filed a judgment creditors' bill against both the mortgagee and mortgagor. Held, that as they had obtained no lien upon specific property, the bill would not lie.

The Court said:

> "The complainants in this case never obtained a lien upon the property in question, or any part thereof, so far as appears upon this record. *They are not in a situation to attack the validity of the defendants' last mortgage without such lien obtained in some manner* (*McKibben vs. Barton,* 1 Mich., 213; *Stoddard vs. McLane,* 56 Id., 11; *Rollins vs. Van Baalen,* Id., 610.)
>
> If we were to concede that the first mortgage of defendants was void as against creditors until it was filed, it does not follow that Mr. Bulkley could not make a valid sale of the goods. This he did to his wife, and Mrs. Bulkley gave the lien under which the defendants now claim. This she could do without committing any fraud against the complainants. *The defendants' holding an unrecorded mortgage did not give the complainants a lien upon the goods,* and there was nothing to prevent Mrs. Bulkley from taking a valid title to the property, free and discharged from any equities which the complainants could claim at the time she purchased. She took such a title when she purchased, and could

thereafter convey the same to defendants or any other person."

In the case at bar, assuming that the creditors, claimed to be represented by the trustee, sold goods and extended credit to Coates during the time between the making and the filing of the chattel mortgage, *that fact did not give them a lien upon the property covered by the mortgage.* Without such a lien, under the case last above cited and quoted from, they were not in a situation to attack the validity of the mortgage. Coates had the right to make a valid sale of the property to Tidball & Parmeter, which he did, free and discharged from any equities which such creditors could claim at the time of the sale. We therefore submit that that case is decisive in the case at bar as to the question under discussion.

In *Trowbridge vs. Bullard,* 81 Mich., 456, the Court said:

> "It has many times been held by this Court that general creditors, *having no judgment or lien on the debtor's property,* cannot attack conveyances or other dealings for fraud."

In *Dempsey vs. Pforzheimer,* 86 Mich., 652, it was held that a creditor who has the right *to secure a lien by legal process* superior to that of a chattel mortgage then on file, because his debt was contracted while the mortgage was withheld from record, may obtain a *like lien* by the execution to him by the debtor of a chattel mortgage to secure the same indebtedness after the filing of the first mortgage. It was held, that in order to enable him to attack the first mortgage, he must obtain *some lien* upon the property. The reason for requiring him to obtain some lien was stated by the Court, after quoting the language above quoted by us from *Thompson vs. Van Vechten,* 27 N. Y., 568, as follows:

> *"The gist of the reason is that the creditor has no business with the debtor's property until he has obtained possession of it by some legal process that gives him a lien upon it. This is not because of any right that the mortgagor, who has kept his mortgage from record, has against the other creditors, but because such creditors have no right to touch the debtor's property without his consent, without legal process."*

See also:

> *Scott vs. Chambers,* 62 Mich., 532.

The rule is thus seen to be well settled in Michigan that a chattel mortgage cannot be questioned by a creditor who

has not obtained a judgment or secured *some lien* on the mortgagor's property; that general creditors, *having no lien,* cannot attack it. The case of *York Mfg. Co. vs. Cassell, supra,* settled that an adjudication in bankruptcy was not, as some courts had assumed was established by *Mueller vs. Nugent,* 184 U. S., 1, "an attachment and injunction," but that the trustee in bankruptcy stands simply in the shoes of the bankrupt; *that the adjudication does not give the trustee any lien upon which to base proceedings attacking title to property good as againts the bankrupt.*

The effect of the holding in *York Mfg. Co. vs. Cassell,* supra, was recognized in *Marine Savings Bank vs. Norton,* 160 Mich., 614-625, where the Court said:

> *"Such adjudication (of bankruptcy), however, does not create a lien in favor of the creditors, and is not equivalent to a judgment attachment, or other specific lien upon the assets of the bankrupt (York Mfg. Co. vs. Cassell,* 201 U. S., 344)."

See also:

> *Wasey vs. Whitcomb,* 132 N. W. (Mich.), 572; 18 D. L. N., 654.

In every Michigan case which can be cited, it will be found that the creditor by some process, or by some proceeding like garnishment, or by the taking of a second mortgage, or by some other means, had put himself, or had been placed, in a position to attack the mortgage, or that the property sought to be reached was not in the possession of the mortgagee, but that such mortgagee was asserting claim to it under his invalid mortgage. *Not a case can be cited from Michigan where a creditor without a lien of some nature has been permitted to attack a mortgage.*

Thus, in *Fearey vs. Cummings,* 41 Mich., 376, the mortgage was attacked in garnishment proceedings. The Michigan garnishment statute (M. C. L. of 1897, Sec. 10601) gives to the plaintiff a lien upon the property or indebtedness in the hands of the garnishee defendant from the time of the service of the writ upon him.

In *Waite vs. Mathews,* 50 Mich., 392, the suit was trover by the mortgagee for the conversion of certain property covered by the mortgage. Defendant claimed to have acted under executions issued upon judgments obtained in the United States Court. Thus, it is seen that in that case the creditor was armed with process which had actually been levied upon the property.

In *Crippen vs. Fletcher,* 56 Mich., 386, the proceeding was by garnishment, which, as has been seen, gives a lien from the time of the service of the writ.

In *Root vs. Harl,* 62 Mich., 420, the mortgagor had made a general assignment for the benefit of creditors and the property had been sold, presumably by the assignee, and a decree, never appealed from, had been made declaring the mortgage void as to the creditors whose claims were contracted between the date of the making and filing of the mortgage. Thus, it is seen that the mortgagee did not have possession of the property, but came into Court to assert his claims against the creditors under a mortgage which had been declared void in a decree not appealed from. Of course, he was not in a position to assert any claim under the mortgage as against such creditors.

In *Krolik vs. Root,* 63 Mich., 562, the case above discussed, the suit was by judgment creditors who claimed to have extended credit during the time a chattel mortgage was withheld from record, but it was held, as above shown, that the suit could not be maintained, because the creditors had no lien upon specific property.

In *Johnson vs. Stellwagen,* 67 Mich., 10, a chattel mortgage had been withheld from record, and during the time it was withheld certain creditors had extended credit to the mortgagor, but before any of these creditors had taken any steps to acquire a lien upon the property, the mortgagor gave a second chattel mortgage to the mortgagee, which second mortgage, antedated as of the date of the first mortgage, was duly filed. Held, that the second mortgage was good as against such creditors, notwithstanding the fact that it was antedated.

In *Brown vs. Brabb,* 67 Mich., 17, the suit was by the assignee for the benefit of the creditors of the mortgagor to cancel a chattel mortgage not duly filed, but it was held that as the assignee did not represent any creditors who were in a position to challenge the validity of the mortgage, the suit could not be maintained.

In *Cutler vs. Steele,* 85 Mich., 627, the suit was to foreclose a chattel mortgage, which had been withheld from record. With the exception of the mortgagor, the defendants were creditors of the mortgagor who had obtained judgments against him and levied executions upon the property. Of course, by levying upon the property the creditors had obtained a lien upon it, and it was held that the mortgagee was not entitled to a foreclosure of the mortgage.

In *Cutler vs. Huston,* 158 U. S., 423, which involved the validity of the same mortgage that was involved in the case of *Cutler vs. Steele,* a creditor of the mortgagor, who had become such during the time the mortgage was withheld from record, obtained judgment against the mortgagor, and instituted garnishment proceedings against the mortgagee. Of course, in the garnishment proceedings, as above shown, a lien was obtained upon the property in the hands of the mortagee.

In *Dempsey vs. Pforzheimer,* 86 Mich., 652, also above cited and quoted from, the suit involved the question of priority between two mortgagees claiming under different chattel mortgages covering the same property, the first of which in point of time had been withheld from record, and it was held that the second mortgage in point of time gave to its holder a lien upon the property which entitled him to attack the validity of the first mortgage.

In *Bank vs. Gunterman,* 94 Mich., 125, the suit was trover by the holder of an unfiled chattel mortgage against a creditor who was such at the time the mortgage was given, but who had subsequently, with notice of the mortgage, caused a writ of attachment to be levied upon the property covered by the mortgage. Held, that as the creditor had notice of the mortgage, it was good as against it.

In *Kennedy vs. Dawson,* 96 Mich., 79, the suit was replevin by the holder of a chattel mortgage, which had been withheld from record, against an assignee for the benefit of the creditors of the mortgagor, who at the time of the commencement of the suit was in possession of the property covered by the mortgage. Held, that the suit could not be maintained as against the assignee, who represented creditors who had extended credit to the mortgagor while the mortgage was withheld. In that case the property was in the possession of the assignee, the representative of the creditors.

In *Ramsdell vs. Power Co.,* 103 Mich., 89, a petition was filed to compel a receiver to turn over to the sheriff certain property claimed by virtue of an attachment levy. A trust mortgage had been made and withheld from record for a period of time during which credit had been extended to the mortgagor by the plaintiff in the attachment suit. The creditor commenced suit and levied an attachment upon the property, and the next day a receiver of the property was appointed in a suit to foreclose the trust mortgage. The attachment suit proceeded to judgment and execution, and the sheriff then filed the petition to obtain possession of

the property levied upon under the writ of attachment, and the petition was granted. Of course, by the levy of the writ of attachment a lien was obtained upon the property.

In *Vining vs. Millar,* 116 Mich., 144, the suit was replevin by the holder of a chattel mortgage which had been withheld from record against a subsequent creditor of the mortgagor in possession of the property under a subsequent chattel mortgage. Held, that the suit could not be maintained. Of course, the second mortgage gave to its holder a lien upon the property, and furthermore the first mortgage was void as to the mortgagee in possession under the second mortgage.

In *Baker vs. Parkhurst,* 119 Mich., 542, a chattel mortgage had been withheld from record. During the time it was withheld, goods had been sold and credit extended to the mortgagor. The creditors obtained judgments upon their claims, and instituted garnishment proceedings against the mortgagee who had been paid the amount of his claim on a sale by the mortgagor of the property. Of course, the garnishment proceedings gave to the creditors a lien, as above shown.

In *People vs. Burns,* 161 Mich., 169, the suit was by the holder of a chattel mortgage against a sheriff upon his statutory bond to recover for the seizure and sale of certain goods by him under an execution issued upon a judgment. The mortgage did not have annexed to it the proper statutory affidavit showing the good faith of the parties and the adequacy of consideration. Held, that the mortgagee was not entitled to recover as against the sheriff. Of course, the levy of the execution created a lien upon the property.

It is thus seen from this review of the Michigan cases that in every one of them where a creditor was allowed successfully to attack an unfiled chattel mortgage, such creditor had obtained a lien upon the property covered by the mortgage, or upon the proceeds of that property, either by a judgment and the levy of an execution on the property, or the levy of an attachment on the property, or by garnishment proceedings against the person in possession of the property or its proceeds, or by a subsequent chattel mortgage covering the property, or that the property itself was in the possession of an assignee for creditors and the mortgagee was attempting to recover possession of it from such assignee; in short, *that the creditor has had a lien in every such case.* Without such a lien, as said in the case of *Dempsey vs. Fforzheimer,* in the language above quoted

from that case, *"the creditor has no business with the debtor's property until he has obtained possession of it by some legal process that gives him a lien upon it. * * * Such creditors have no right to touch the debtor's property without his consent, without legal process."* Where the property claimed under the unfiled chattel mortgage is in the hands of an assignee, who is the representative of the creditors as well as of the debtor, of course the mortgagee cannot assert his title under the unfiled mortgage against such assignee. The mortgagee in such a case would be the moving party, and his failure to file his mortgage would defeat his right to affirmative relief as against these creditors, or their representative, in possession of the property, as to whom the mortgage was void. In the case at bar, neither the property nor its proceeds are in the possession of the Trustee, and the Trustee, not the Bank, is the moving party. *Therefore, we submit that under the Michigan cases it is equally as necessary for a creditor to have a lien in order to attack an unfiled mortgage as under the Ohio and Kentucky decisions referred to in the cases decided by this Court above cited and quoted from.*

We are aware that some cases from State courts, and some from Federal courts in other circuits than this, can be cited which are apparently in conflict with the holding of this court in *York Mfg. Co. vs. Cassell, and Holt, Trustee vs. Crucible Steel Co.*, and with the decisions of the Court of Appeals in the cases above cited, but we apprehend that this court will see fit to adhere to its former decisions and those of the Court of Appeals, especially in view of the fact that Congress has taken cognizance of the effect of these holdings by passing the amendment of 1910, *thus recognizing the necessity for such an amendment in order to effectuate the purpose which the amendment accomplishes.*

In the case at bar, as before stated, none of the creditors of Coates claimed to be represented by the Trustee, had obtained any lien, and had taken no steps to acquire any, upon the property covered by the chattel mortgage, nor upon the money paid to the Bank on January 10, 1903, and, therefore, the Trustee is not in a position to attack the validity of that mortgage in behalf of such creditors, and is not entitled to recover from the Bank the amount of their respective claims.

*The payment by Coates to the Bank on January* 10, 1903, *of his indebtedness was entirely voluntary on his part, and not because of any steps taken by the Bank to enforce the chattel mortgage, or because of any coercion whatever towards him on the part of the Bank by means of the chattel mortgage or otherwise, and therefore none of the creditors whom the Trustee claims to represent in this suit could have recovered from the Bank the amount of their respective claims.*

The uncontradicted evidence shows that the Bank took no steps whatever to enforce the chattel mortgage, and that the terms of the sale by Coates to Tidball & Parmeter had already been agreed upon, and the inventory practically completed, before Coates on the afternoon of January 10, 1903, informed Tidball & Parmeter of the chattel mortgage, and that he then told them that it was *his wish* to pay his indebtedness to the Bank. Tidball testified:

> "Q. What, if any, arrangement did you make with Mr. Coates as to paying this money to the Pontiac Savings Bank?
>
> A. Made no arrangement with Mr. Coates.
>
> Q. Did you tell him you were going over to the Pontiac Savings Bank to pay it?
>
> A. *It was his wish.*"

R. p. 34.

That evening (Saturday) Coates and Tidball went to the Bank (it does not appear whether Parmeter also was present), and Tidball paid to Coates the purchase price, $5,187.36, in drafts and certificates of deposit. As to this Tidball testified as follows:

> "Q. Did you pay the full amount for the stock into the bank or to Mr. Coates?
>
> A. *To Mr. Coates in the presence of one of the bank officers.*"

R. p. 35.

We call attention to this particularly, because in the answer of the Bank (Par. 16, there being also a similar statement or admission in Par. 10), the following statement or admission, upon which counsel for the Trustee seized in the lower court and attempted to make much of, was inadvertently made: "That said Tidball & Parmeter voluntarily paid the balance of said chattel mortgage, to-wit: $2,120.50, to this defendant January 10, 1903." (R. pp. 9-10.) The receipt given by the Bank to Tidball & Parmeter states that the payment was "received of Charles Coates through Tidball & Parmeter" (R. p. 33).

Tidball & Parmeter did not pay the balance due the Bank, $2,120.50, which was secured by the chattel mortgage, but they paid to Coates the full purchase price for the property, and Coates deposited the drafts and certificates thus turned over to him to the credit of his account in the Bank, and then gave to the Bank a check on his account in payment of his indebtedness. Those are the real facts. Under such circumstances, under a well settled rule, the statement or admission in the answer above quoted which, it is clear, was made improvidently and by mistake, is not binding upon the Bank, and the Court will relieve the Bank from its effect by an order directing the statement or admission to be treated as no part of the record.

*Greenl. Ev., Sec.* 206.
*Puterbaugh's Mich. Ch. Pr. p.* 109.
*Maher vs. Bull,* 39 *Ill.,* 531.

In this connection, we wish to clear up the loose expressions contained in the answer of the Bank above quoted. The statement made in the answer is that Tidball & Parmeter paid the balance of the chattel mortgage. A chattel mortgage, or any other mortgage, is not an indebtedness, which can be paid, but it is simply security for an indebtedness. It is not correct to say that a mortgage is paid; a mortgage is not paid, but the indebtedness secured by it is paid. In the case at bar, therefore, the chattel mortgage in question was not paid by either Coates or Tidball & Parmeter, but the indebtedness secured by that mortgage was paid. We would not have called attention to this obvious distinction if counsel for the Trustee had not in the lower court placed such emphasis on the statement of the answer that Tidball & Parmeter paid the mortgage.

The payment by Coates of his indebtedness to the Bank having been voluntary, and not as the result of any steps taken by the Bank to enforce the chattel mortgage, nor of any coercion by the Bank by means of the chattel mortgage, the Trustee, as the representative of the creditors claimed to be represented by it, cannot attack the payment on the ground that the chattel mortgage was invalid as to such creditors.

*Folkerts vs. Standish,* 55 Mich., 463.
*Crusoe Bros. vs. Kudner,* 136 Mich., 583.

In *Folkerts vs. Standish, supra,* where a chattel mortgage had not been filed, the debtor turned out to the creditor who was a holder of the mortgage certain property in payment of his indebtedness. Held, in garnishment

proceedings against the creditor who had held the chattel mortgage, that the debtor had the right *voluntarily* to turn out to him property in payment of his indebtedness, and that such turning out was not a taking by virtue of the mortgage. The Court said:

> "Neither is it claimed by plaintiff's counsel that the company might not have lawfully paid its indebtedness to defendant by letting him have lumber for the amount, as it is claimed was done in this case. It was the theory of the plaintiff, however, upon the trial, that the defendant did not receive the lumber in payment of his claim, but that he received and took possession of it under and by virtue of his mortgage, which, not having been filed, was void as to the plaintiff, and no title to the lumber passed as against the plaintiff's claim. The fact whether the lumber was so received or not upon the mortgage was submitted to the jury by the court, and they were told that, if they found the plaintiff's theory correct, they would be entitled to recover. Defendant's counsel insisted there was no testimony in the case to support such theory, and that the charge of the court submitting the question to the jury was unwarranted.
>
> We have examined the record in vain to find any testimony in the case tending to show *that the lumber was turned out upon the chattel mortgage, or that the defendant received or took possession of the same under or by virtue of his mortgage.* We think the exception of defendant's counsel was well taken, and his first request to charge should have been given. It is true it was claimed that the mortgage was void for other reasons; *but inasmuch as there was no showing that defendant took the lumber by virtue of the mortgage, it became of no consequence in the case.*"

In *Crusoe Bros. vs. Kudner, supra,* a chattel mortgage was withheld from filing by the mortgagee for about a month, and during the period it was thus withheld certain persons extended credit to the mortgagor. After it was filed, the mortgagor could no longer obtain credit, and voluntarily paid to the mortgagee his indebtedness or turned out to him property in payment of it. There was no attempt by the mortgagee to enforce the mortgage, but the payments by the mortgagor were voluntary. Held, that the creditors whose claims had accrued while the chattel mortgage remained unfiled could not in garnish-

ment proceedings question the payments to the mortgagee, because such payments were voluntary on the part of the mortgagor, and the mortgagee had not taken any property by virtue of or by reason of the mortgage. The Court said:

> "Counsel for defendant concede the mortgage was void as to plaintiff's claim because it was not filed during the time this indebtedness was contracted, *but say the facts eliminate the mortgage from the case, because Mr. Kudner took no property by virtue of it, and did not exercise any rights thereunder.* * * * * * * * * * *
>
> *The court found as a matter of fact that Mr. Kudner did not take any of the property by virtue of or by reason of the mortgage. There was evidence which tended to support this finding.* * * *
>
> We think the case is controlled by a decision of our own court; that is, *Folkerts vs. Standish*, 55 Mich., 463 (21 N. W., 891). Counsel claim the *Folkerts case* is distinguishable from this, because there was no agreement in that case to withhold the mortgage from record, while in this case there was such an agreement. An examination of the original record will show even a stronger state of facts in the *Folkerts case*, showing an understanding between the parties to the mortgage that it should be withheld from record, than in this case. The case was made to turn upon the fact that the property was not taken by reason of the mortgage, but was bought and the proceeds applied on a debt to which the mortgage was collateral security.
>
> If there had been in fact no chattel mortgage and the dealings between Mr. Smith and Mr. Kudner had in other respects been the same as now, it would not be claimed Mr. Kudner must account as garnishee defendant for what he received and actually applied on Mr. Smith's indebtedness to him. *Does the fact that he had a chattel mortgage which he did not file, and under which he did not act, place him in a different position? We think the answer must be in the negative.*"

Apply the rule of these cases to the facts of the case at bar, The Bank did not take any property by reason of or by virtue of the chattel mortgage. The payment by Coates was voluntary. The Bank had not even asked for payment, so far as the record discloses, but Coates, after all the terms of the sale to Tidball & Parmeter had been agreed upon, and after the inventory had been taken, himself expressed to Tidball the wish to pay his indebtedness

to the Bank, and it was as the result of his own voluntary action that his indebtedness was paid, and not as the result of any coercion by the Bank by means of the chattel mortgage. Under such circumstances, we submit that the payment was voluntary, within the rule of the cases above cited.

Was the chattel mortgage taken into consideration at the time Tidball & Parmeter paid the money to Coates, and Coates deposited it in the Bank, and drew a check against this deposit in payment of his indebtedness to the Bank? We do not question that the chattel mortgage was taken into consideration at that time, but what we do claim is that Coates' indebtedness to the Bank was not paid because of any steps taken or threats made by the Bank by reason of the chattel mortgage. The payment of his indebtedness by Coates to the Bank was purely voluntary on his part, without any action whatever having been threatened or taken by the Bank by reason of the mortgage.

If the Bank had not held the chattel mortgage in question, then there is no doubt, under the facts disclosed by the evidence in this case, that Coates would have had the right to pay his indebtedness to it precisely as he did, and that none of the creditors represented by the Trustee could have questioned such payment. Did the Bank have less right to accept payment because of the fact that it held this mortgage than it would have had if it had not held the mortgage? If so, why? If the Bank could have accepted payment if it had not held the mortgage, and creditors could not have complained, what is there in the fact that it held the mortgage that gives to creditors the right to complain? If the Bank had taken any steps whatever under the mortgage to secure payment, had exercised any coercion over Coates by reason of the mortgage, then the creditors might complain. But the evidence discloses that the Bank took no steps whatever, exercised no coercion whatever, that the payment by Coates was purely voluntary, and we therefore submit that the case falls squarely within the rule of *Crusoe Brothers vs. Kudner.*

In saying that the mortgage was taken into consideration when the indebtedness was paid, we simply mean this: The mortgage was valid as to Coates, and it was valid as to Tidball & Parmeter, and the latter, on purchasing the stock, naturally wished to have it discharged. To that extent, it was taken into consideration. But the payment of the indebtedness, and the securing of the discharge of the mortgage in that way, were voluntary on the part of Coates; it was his wish, as Tidball testified.

The case of *Krolik vs. Root*, 63 Mich., 563, also above cited, is in principle like the cases of *Folkerts vs. Standish* and *Crusoe Bros. vs. Kudner*. In that case, a chattel mortgage was withheld from record for a period of time, during which certain creditors sold goods and extended credit to the mortgagor. The mortgagee then came into possession of the property through the purchase of a prior mortgage under which possession had been taken, and the mortgagor then executed to the mortgagee, a second mortgage covering the property, and gave to his wife a bill of sale of the property, expressly subject to the liens of the mortgagee under the two mortgages, and the possession of the property was surrendered to her by the mortgagee. On a judgment creditors' bill by the creditors who had sold goods and extended credit during the period of time the mortgage was withheld from record, the Court said with reference to this transaction:

> "If we were to concede that the first mortgage of defendants was void as against creditors until it was filed, *it does not follow that Mr. Bulkley could not make a valid sale of the goods.* This he did to his wife, and Mrs. Bulkley gave the lien under which the defendants now claim. This she could do without committing any fraud against the complainants. *The defendants' holding an unrecorded mortgage did not give the complainants a lien upon the goods, and there was nothing to prevent Mrs. Bulkley from taking a valid title to the property, free and discharged from any equities which the complainants could claim at the time she purchased.* She took such a title when she purchased, and could thereafter convey the same to defendants or any other person."

In the case at bar, conceding that the chattel mortgage held by the Bank was void as to the creditors, claimed to be represented by the Trustee, who claim to have sold goods and extended credit to Coates between the time of the making and the filing of the chattel mortgage, it does not follow that Coates, the mortgagor, could not make a valid sale of the goods covered by the mortgage to Tidball & Parmeter. This he did. The Bank's holding a mortgage which was void as to the creditors in question did not give them a lien upon the goods, and there was nothing to prevent Tidball & Parmeter from taking a valid title to the property, free and discharged from any equities which these creditors could claim at the time of the purchase. They took such a title when they purchased. The money which Coates received on this sale, he could use to pay

his indebtedness to the Bank, which he did. That is all there was to the transaction. The Bank did not enforce payment by means of the mortgage.

The case upon which counsel for the Trustee will rely, and which he will urge strenuously as authority in the case at bar, *Baker vs. Parkhurst,* 119 Mich., 542, will be found to be, when carefully examined, clearly distinguishable from the case at bar, although having many facts in common with the case at bar. In that case, a chattel mortgage had been withheld from filing for several months, during which certain persons had extended credit to the mortgagor. The mortgage was then filed, and a sale was arranged by the mortgagor to a brother-in-law of the mortgagee, the mortgagee being cognizant of the arrangement, and, as the facts clearly tended to prove, being in fact the procurer of the sale. The proceeds of the sale were turned over to the mortagee in partial payment of the indebtedness of the mortgagor. As the court found, "there was a perfect understanding between Parkhurst & Co., Welch and Williams during the negotiations which led up to the sale by Welch to Williams." In the case at bar, there was no understanding whatever between the Bank on the one side and Tidball & Parmeter on the other, or between the Bank and Coates, in fact, Tidball & Parmeter knew nothing whatever of the mortgage until after all the terms of the sale had been agreed upon and the inventory had been taken. In that case, the sale to the brother-in-law of the mortgagee was simply a method by which the mortgagee sought to obtain payment of the indebtedness secured by his mortgage. The mortgagee unquestionably engineered the whole deal, with the intent of defrauding the creditors of the mortgagor who had extended credit while the mortgage remained unfiled. There were many other circumstances tending to show fraud on the part of the mortgagee, such as the fact that he reported for the commercial agencies like Dunn and Bradstreet, but made no mention of the chattel mortgage held by himself in making a report of the mortgagor's condition, and in that way misled the creditors. There are no such facts in the case at bar. In that case, the transaction in which the indebtedness secured by the mortgage was paid was clearly a "frame-up" (to use an expression in somewhat common use) between the mortgagor, the mortgagee, and the brother-in-law of the latter who became the purchaser, to enable the mortgagee to realize upon the mortgage. It was a plain case of fraud. There is no such state of facts in the case at bar. There is not a word of evidence in the record having any ten-

dency to show that the Pontiac Savings Bank, Tidball & Parmeter, and even Coates, did not act in the utmost good faith in the transaction in which Coates' indebtedness to the Bank was paid. In that case, the court was clearly warranted in holding that the sale was merely a method by which the mortgagee sought to obtain payment of the indebtedness secured by his mortgage, and that such payment could be questioned in garnishment proceedings by the creditors whose claims accrued while the mortgage remained unfiled. Such payment was clearly not voluntary on the part of the mortgagor, but was made as a result of the coercion of the mortgagee by means of the chattel mortgage. In the case at bar, as we have said, the payment was voluntary, and was not due in the slightest degree to any coercion by the Bank by means of the chattel mortgage. The case at bar, therefore, clearly falls within the rule of the cases above cited, *Folkerts vs. Standish* and *Crusoe Bros. vs. Kudner,* rather than under the rule of *Baker vs. Parkhurst.* In the case at bar, counsel for the Trustee are asking the court to go a step farther than the Michigan Supreme Court went in the case of *Baker vs. Parkhurst,* and a step farther than that Court has gone in any case that can be cited.

The payment to the Bank on January 10, 1903, having been wholly voluntary on the part of Coates, and not as the result of any coercion by the Bank by means of the chattel mortgage or otherwise, it follows that the Trustee is not entitled to recover from the Bank in behalf of the creditors, who claim to have sold goods and extended credit to Coates between the time of the making and the filing of the chattel mortgage, the amount of their respective claims.

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This brief is largely a reprint of our brief in the Court of Appeals on the two questions discussed, and perhaps contains more than is actually necessary to enable this Court to understand the position of the Defendant Bank, in view of the very careful and learned opinion of the Court of Appeals.

We respectfully submit that the decision and decree of the Court of Appeals should be affirmed.

ELMER R. WEBSTER,
*Solicitor for Defendant, Pontiac Savings Bank,*

GEER, WILLIAMS, MARTIN & BUTLER,
*Of Counsel.*

Harrison Geer.

# DETROIT TRUST COMPANY, TRUSTEE IN BANKRUPTCY OF COATES, *v.* PONTIAC SAVINGS BANK.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 173. Argued March 5, 1915.—Decided April 5, 1915.

The law of Michigan, as it was in 1903, did not give to unsecured creditors of the mortgagor a lien upon the property covered by an unrecorded chattel mortgage, but merely a right to a lien requiring a proceeding of some kind for its fastening; and the right to such a lien was lost if the proceeding was not taken prior to the bankruptcy of the mortgagor.

196 Fed. Rep. 29, affirmed.

THE facts, which involve the rights of creditors of a bankrupt as against those of the holder of an unrecorded chattel mortgage under the laws of the State of Michigan, are stated in the opinion.

*Mr. Bernard B. Selling* for complainants and appellants.

*Mr. Harrison Geer* and *Mr. Elmer R. Webster* for defendants and appellees, submitted.

Memorandum opinion by MR. JUSTICE MCREYNOLDS, by direction of the court.

To secure his outstanding note for $2300, Coates, a resident of Michigan and the present bankrupt, gave the Pontiac Savings Bank a mortgage upon his stock of goods, fixtures, etc., in May, 1902, which was not filed for record until the following September. Between these dates he

incurred indebtedness exceeding $1400 to sundry dealers for goods sold and delivered; and it is admitted that under the laws of Michigan the mortgage was void as to them although good as between the parties thereto. In January, 1903, Coates sold the chattels for cash, paid his note out of the proceeds and procured a release of the lien upon the records by the mortgagee who acted with knowledge of the facts. Proceedings were instituted against him shortly thereafter and he was duly adjudged a bankrupt. Appellant here was appointed trustee and, replying upon supposed rights of creditors, commenced this proceeding in the District Court—September, 1903—to recover from the Pontiac Savings Bank the amount of allowed claims for debts contracted by the bankrupt while the mortgage was off the records, although none of them had been reduced to judgment and no steps had been taken to fix a lien upon the property or its proceeds. The bank set up the absence of any lien and the validity of the mortgage as between the parties thereto and maintained that the trustee stood in the shoes of the bankrupt and could not enforce the alleged rights of creditors. This defence was sustained by the Circuit Court of Appeals (196 Fed. Rep. 29).

The cause has been pending a very long time and must be decided under the provisions of the Bankrupt Act as it existed in February, 1903,—before the material changes created by amendments—and according to the laws of Michigan then in effect whose exact import is not entirely clear. Being of opinion that the action of the court below was correct, we will consider only the ground which it assigned therefor.

Payment to the bank by the bankrupt is attacked as invalid under § 9523, Michigan Compiled Laws of 1897, which provides that every chattel mortgage "which shall not be accompanied by an immediate delivery, and followed by an actual and continued change of possession of

the things mortgaged, shall be absolutely void as against the creditors of the mortgagor" unless filed for record as directed.

The Circuit Court of Appeals declared (p. 33): "It is settled by the decisions of the Supreme Court of Michigan that the words 'creditors of the mortgagor' mean subsequent creditors in good faith and without notice of the mortgage, and that the statutory invalidity of an unfiled chattel mortgage extends to all creditors who became such after the giving and before the filing of the mortgage. Recovery can be had here on but one of two theories: First, that the bankruptcy act creates a lien in favor of the creditors under which the rights given by the Michigan statute can be enforced; or, second, that the Michigan statute creates such a lien. The bankruptcy act does not operate as an attachment of the bankrupt's property, nor itself create a lien in favor of creditors of the class before us. *York Mfg. Co.* v. *Cassell*, 201 U. S. 344; *Crucible Steel Co.* v. *Holt*, 174 Fed. Rep. 127; affirmed by the Supreme Court April 1, 1912, 224 U. S. 262. The controlling question, therefore, is whether the rights given by the Michigan statute to the class of creditors named amount to an actually established lien, or, on the other hand, to a mere right to create a lien. . . . Since the decision below, the case of *In re Huxoll*, 193 Fed. Rep. 851, has been decided by this court. We there carefully reviewed and considered the Michigan decisions, and reached the conclusion that the Michigan statute does not of itself create a lien upon the mortgaged property prior to the lien of the mortgage; but gives merely a right to a lien, requiring a proceeding of some kind for its fastening. We there held that the right to lien was lost if such proceeding was not taken before bankruptcy."

Replying to the contention that an assignee for the benefit of creditors in Michigan may avoid unrecorded chattel mortgages and that the rights of a trustee in bank-

ruptcy are not less, the Circuit Court of Appeals further said: "As we pointed out in the *Huxoll Case*, the Michigan decisions mean no more than that the assignee is by the assignment given a lien upon the property which did not before exist. The mere fact that a lien is created under statutory assignment for the benefit of creditors does not give a lien under the Bankruptcy Act. This conclusion directly follows from the decision in *York Mfg. Co.* v. *Cassell, supra.*"

We think the Circuit Court of Appeals properly interpreted and applied the doctrine announced in *York Mfg. Co.* v. *Cassell*, and are unable to see that it reached an incorrect conclusion concerning the pertinent laws of Michigan. *Holt* v. *Crucible Steel Co.*, 224 U. S. 262, 267.

The decree is

*Affirmed.*